Supreme Court of the United States

OCTOBER TERM, 1964

No. 62

FEDERAL TRADE COMMISSION, PETITIONER

vs.

COLGATE-PALMOLIVE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6145

COLGATE-PALMOLIVE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 6146

TED BATES & COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITIONERS' CONSOLIDATED RECORD APPENDIX AND PROCEEDINGS IN SAID CAUSE TO AND INCLUDING MARCH 31, 1964

[fol. 1] RELEVANT DOCKET ENTRIES.

1961

Dec. 29—Issuance of Order and Opinion of Federal Trade Commission

1962

Nov. 20—Issuance of Decree and Opinion of Court of Appeals for the First Circuit in Nos. 5972 and 5986

1963

Feb. 18—Issuance of Proposed Order and Second Opinion of Federal Trade Commission

Mar. 18—Filing of Motion by Colgate-Palmolive Company for extension of time for filing exceptions; and
Filing of Motion by Ted Bates & Company, Inc. for extension of time for filing exceptions

Mar. 20—Issuance of Order extending time of respondents to file exceptions

Apr. 15—Filing of Exceptions by Colgate-Palmolive Company to Proposed Order; and
Filing of Exceptions by Ted Bates & Company, Inc. to Proposed Order

Apr. 25—Filing of Statement by complaint counsel

May 7—Issuance of Third Order and Memorandum of Federal Trade Commission

June 6—Filing in this Court of Petition by Colgate-Palmolive Company to Correct, Review and Set Aside Order of the Federal Trade Commission; and
Filing in this Court of Petition by Ted Bates & Company, Inc. for Review and to Correct Order of Federal Trade Commission; and

[fol. 2]

Filing of Motion by Colgate-Palmolive Company to Federal Trade Commission requesting Commission to correct its Order; and
Filing of Motion by Ted Bates & Company, Inc. to Federal Trade Commission requesting Commission to correct its Order

1963

June 11—Issuance of Order of Federal Trade Commission denying respondents' motions to correct its Order; and

Issuance of Orders of the Court granting leave to petitioners to consolidate memorando on motions in Nos. 6147 and 6148 with briefs in these proceedings

July 16—Certified transcript of record forwarded by Federal Trade Commission to this Court; and

Notice given by Clerk of this Court as to time within which to file designation of record and filing of briefs and appendix

July 23—Filing of Petitioners' Statement of Points and Designation of Parts of Record to be Printed

Joint motion to consolidate appeals, permit respondent to file consolidated brief and to extend time for filing of briefs.

July 25—Issuance of order granting joint motion filed July 23

[fol. 3]

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman
SIGURD ANDERSON
WILLIAM C. KERN
PHILIP ELMAN
EVERETTE MACINTYRE

FIRST ORDER AND OPINION OF COMMISSION—issued December 29, 1961

* * * *

In addition to the findings of fact and conclusions stated in its opinion, the Commission adopts the following:

FINDINGS OF FACT

1. Respondent Colgate-Palmolive Company is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 300 Park Avenue, New York, New York.

2. Respondent Ted Bates & Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 666 Fifth Avenue, New York, New York.

3. Respondent Colgate-Palmolive Company is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale, and distribution of a shaving cream designated "Palmolive Rapid Shave," [fol. 4] and various other products, to distributors and to retailers for resale to the public.

4. In the course and conduct of its business, respondent Colgate-Palmolive Company now causes, and for some time last past has caused, its "Palmolive Rapid Shave" when sold, to be shipped from its factories or plants in the various states of the United States to purchasers located in various other states of the United States and in the

District of Columbia, and maintains, and at all times relevant has maintained a substantial course of trade in "Palmolive Rapid Shave," in commerce as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of its business, at all times relevant, respondent Colgate-Palmolive Company has been in substantial competition in commerce with corporations, firms, and individuals in the sale of shaving cream.

6. Respondent Ted Bates & Company, Inc., is now, and for some time last past has been, an advertising agency of respondent Colgate-Palmolive Company, and now prepares and places, and for some time last past has prepared and placed, for publication, advertising material, including television commercials but not limited to those described below, to promote the sale of "Palmolive Rapid Shave" and other products.

7. On behalf of respondent Colgate-Palmolive Company, respondent Ted Bates & Company, Inc., originated, prepared, and placed, for showing over national network television, television commercials dealing with "Palmolive Rapid Shave," which commercials were shown over a nationwide television network during the latter part of 1959, and also over a number of local television stations throughout the United States, in connection with the advertising, offering for sale, sale, and distribution of "Palmolive Rapid Shave" in commerce.

[fol. 5] 8. Respondents, by means of these television commercials have represented, directly or by implication that the "moisturizing" action of "Palmolive Rapid Shave" is such that by application of that product to the surface of very coarse, dry sandpaper it is possible immediately thereafter to shave off the rough surface of the sandpaper with a single stroke, and that this demonstration proves the "moisturizing" properties of "Palmolive Rapid Shave."

9. What was represented to be sandpaper in these television commercials was in reality a "mock-up" composed of plexiglass to which sand had been applied, especially made for use in the demonstrations depicted in these commercials, and was not in fact sandpaper.

10. The visual appearance of the purported sandpaper, which was actually a "mock-up," as well as the accom-

panying commentary, in these "Palmolive Rapid Shave" commercials create the impression that the viewer is observing the shaving of a very coarsely textured sandpaper, most closely resembling the type of sandpaper commonly denominated "extra coarse."

11. These commercials clearly convey the impression that very coarse pieces of sandpaper are actually being shaved with a single stroke, during the demonstrations depicted, immediately after application of "Palmolive Rapid Shave" to their dry surfaces.

12. Sandpaper of the variety apparently depicted in these commercials cannot successfully be shaved immediately after application of "Palmolive Rapid Shave" to its surface, even with a number of strokes under heavy pressure; sand paper of the variety apparently depicted in these commercials cannot successfully be shaved within one to three minutes after application of "Palmolive Rapid Shave;" even with a number of strokes under heavy [fol. 6] pressure; no piece of sandpaper of the variety apparently depicted in these commercials that appears in the record has been shaved genuinely clean, as the television "mock-up" was, regardless of the interval allowed after application of "Palmolive Rapid Shave;" one reason why real sandpaper was not used in the "Palmolive Rapid Shave" commercials was that it required too long a soaking period before effective shaving was possible.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. The television commercials described above are false, misleading, and deceptive, within the meaning of the Federal Trade Commission Act, in that they represent that the "moisturizing" properties of "Palmolive Rapid Shave" are such that it is possible immediately after application of "Palmolive Rapid Shave" to very coarse, dry sandpaper to shave off the rough surface of that sandpaper with a single stroke, when this is not in fact possible, and that sandpaper of the variety depicted is actually being shaved in the manner depicted in the televised demonstra-

tions, when in reality the thing being shaved is a "mock-up" composed of plexiglass to which sand has been applied, especially made for use in the demonstrations depicted in these commercials.

3. The use by respondents of the aforesaid false, misleading, and deceptive representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that those representations were and are true, and into the purchase of substantial quantities of "Palmolive Rapid Shave" by reason of such erroneous and mistaken belief. As a consequence, substantial trade in commerce [fol. 7] has been, and may be, unfairly diverted to respondent Colgate-Palmolive Company from its competitors, and substantial injury has thereby been done, and may be done, to competition in commerce.

4. The aforesaid acts and practices of the respondents have been, and may be, to the prejudice and injury of the public and of respondent Colgate-Palmolive's competitors, and constituted, and continue to constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

5. In the discharge of the Commission's obligation to preserve competition and protect the public against false, deceptive, or unfair advertising practices of the type here found to be unlawful, it is necessary to prohibit respondents, in advertising not only "Palmolive Rapid Shave" but any other product, from further use of representations, by pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, that do not genuinely represent what they purport to represent and do not prove what they purport to prove about the quality or merits of a product.

In accordance with its findings of fact, opinion, and conclusions of law, the Commission hereby promulgates the following:

FINAL ORDER.

IT IS ORDERED that respondents Colgate-Palmolive Company, a corporation, and its officers, and Ted Bates &

Company, Inc., a corporation, and its officers, and the agents, representatives, and employees of respondents, directly or through any corporate or other device, in the advertising, offering for sale, sale, or distribution of shaving cream or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, [fol. 8] do forthwith cease and desist from:

> Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations, depictions, or demonstrations of, or do not prove the quality or merits of, any such product.

AND FURTHER, in the advertising, offering for sale, sale, or distribution of "Palmolive Rapid Shave," or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, from:

> Misrepresenting, in any manner, directly or by implication, the quality or merits of any such product.

IT IS FURTHER ORDERED that respondents, Colgate-Palmolive Company and Ted Bates & Company, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manned and form in which they have complied with the order to cease and desist.

By the Commission.

[SEAL]

JOSEPH W. SHEA
JOSEPH W. SHEA
Secretary.

• • • •

[fol. 9] Attached is opinion of the Commission by Commissioner Elman.

OPINION OF THE COMMISSION.

* * * *

By Commissioner Elman:

This is an appeal from the hearing examiner's initial decision dismissing a complaint charging respondents Colgate-Palmolive Company and Ted Bates & Company, Inc., with having violated Section 5 of the Federal Trade Commission Act[1] by using false, misleading, and deceptive television commercials in advertising Colgate-Palmolive's shaving cream, "Rapid Shave."

We hold that the initial decision was erroneous; that the allegations of fact in the complaint have been fully substantiated; that respondents, by using these commercials, engaged in unfair and deceptive acts and practices, and unfair methods of competition, in interstate commerce, in violation of Section 5; and that, to protect the public against recurrence of such unlawful conduct, an appropriate cease and desist order should be entered against both respondents.

I.

Respondent Colgate-Palmolive Company makes and sells a shaving cream called "Rapid Shave." Respondent Ted Bates & Company, Inc., is an advertising agency which prepared and placed for publication the three 60-second television commercials advertising "Rapid Shave" which are involved in this proceeding. These commercials were presented on programs sponsored by Colgate-Palmolive that were broadcast on a national network in the latter part of 1959. The scripts of these commercials, detailing their "video" and "audio" content, appear as [fol. 10] exhibits in the record. In addition, the films of the commercials, as actually broadcast, were shown to the Commission during the oral argument of the appeal.

The first of these (Commission Exhibit 2, entitled "Sandpaper Mask—Gifford") opens by showing a foot-

[1] 38 Stat. 719, as amended, 15 U. S. C. § 45.

ball being place-kicked, with the ball zooming toward the viewer. The picture then "cuts" to a football player whose face is hidden behind a mask that appears to be made of coarse, gritty sandpaper. The voice of an unseen announcer asks: "Who is the man behind the sandpaper mask?" The football player strips off the sandpaper mask, revealing a heavy growth of whiskers. As the player rubs his cheek ruefully, the announcer says: "It's triple-threat man, Frank Gifford—backfield sensation of the New York Giants . . . a man with a problem just like yours . . . a beard as tough as sandpaper . . . a beard that needs . . . PALMOLIVE RAPID SHAVE . . . super-moisturized for the fastest, smoothest shaves possible."

As the announcer says "a beard as tough as sandpaper," the picture shifts to the sandpaper mask, and a hand brings a can of "Rapid Shave" into view in front of the sandpaper, with the words "Super-Moisturized" and "Fastest Smoothest Shaves" appearing on the film under the shaving cream. The announcer's voice continues: "To prove RAPID SHAVE'S super-moisturizing power, we put it right from the can. . . ." As this is being said, we see one hand pressing the top of the "Rapid Shave" can so as to dispense a small amount of lather into the other hand. The lather is then spread in one continuous motion upon the surface of the sandpaper and the first hand reappears with a razor and shaves a clean path through the lather and the gritty surface of the sandpaper. While this is taking place, the voice of the announcer continues ". . . onto this tough, dry sandpaper. It was apply . . . soak . . . and off in a stroke." These words are spoken at a normal conversational pace, and there is no "fade," [fol. 11] "dissolve," or other pictorial indication of any lapse of time between "apply," "soak," and "off in a stroke"; the intervals preceding and following the word "soak" last no more than a second.

The picture then shifts to Frank Gifford lathering his face as the announcer continues: "And super-moisturized Palmolive Rapid Shave can do the same for you."

At this point the "split screen" technique is introduced. On one side of the screen a hand is seen applying "Rapid Shave" to sandpaper in an action that parallels Gifford's

on the other side of the screen. As Gifford makes a razor stroke down his cheek, the hand makes a similar stroke down the lathered strip of sandpaper. Again, the shaving, on both sides of the screen, is begun directly after the lather is applied. And, again, there is no "fade," "dissolve" or other visual indication of any lapse of time between the lathering and shaving of the sandpaper, on one side of the screen, and Gifford's face, on the other. While this is being seen, the announcer says: "In this sandpaper test . . . or on your sandpaper beard, you just apply RAPID SHAVE . . . then . . . take your razor . . . and shave clean with a fast, smooth stroke."

We then see Gifford, stroking his clean-shaven face with a look of satisfied approval. The picture at this point shifts to cans of "Rapid Shave" surrounded by the words "Super-Moisturized" and "Fastest, Smoothest Shaves," while the announcer continues: "Try RAPID SHAVE . . . or cooling, soothing RAPID SHAVE-MENTHOL . . . both super-moisturized . . . for the fastest, smoothest shaves possible. They both outshave the tube . . . outshave the brush." In a concluding jingle, to a true reminiscent of "Here we go 'round the mulberry bush," an unseen male chorus sings lustily: "RAPID SHAVE outshaves them all. Use RAPID SHAVE in the morning."

The sights and sounds we have described proceed in a rapid sequence, the whole commercial lasting 60 seconds.

The second commercial here involved (Commission Exhibit 3) is exactly the same except that the football player [fol. 12] with the "sandpaper" beard is Kyle Rote, also of the New York Giants. The third commercial (Commission Exhibit 4) differs from the other two in not showing a celebrity. Quick dramatic effect is attained by likening the feel of a razor stroke to the stroking of a match on sandpaper. After a brief recitation of the shaving comfort to be derived from using "Rapid Shave," with appropriate pictorial accompaniment, the same "sandpaper test" described in the other commercials is repeated.

II.

In one basic respect, the case is free from factual controversy. Respondents concede that the televised "sandpaper" demonstrations were conducted not on real sandpaper but on what is known in the industry as a "mock-up," or simulated prop. As the examiner found, "Actually no sandpaper was employed in the commercials. What was represented as sandpaper was in fact a mock-up made of plexiglass to which sand had been applied."

In dismissing the complaint, the examiner went on to explain, and to justify, respondents' use of a mock-up rather than actual sandpaper:

> "There appear to be several reasons why it was not feasible to use sandpaper. One reason doubtless was that the length of the commercials—60-seconds—was not adequate for sandpaper to be soaked to the point where it could be shaved cleanly. Aside from this, however, there were technical difficulties peculiar to television. When placed under a television camera, sandpaper appears to be nothing more than plain, colored paper; the texture or grain of the sandpaper is not shown. Thus it is necessary to improvise—use a mock-up—if what is seen by the television audience is to have the appearance of sandpaper."

[fol. 13] III.

The examiner considered that the facts of the case raised only one question: "Has there been any material misrepresentation of the product?" To that question, the examiner answered:

> "In the present case it seems clear that there has not. The shaving cream does possess at least adequate moistening or wetting properties and sandpaper can be shaved through use of the product, provided adequate time for soaking is allowed.
>
> "Essentially, what is presented here would appear to be little or nothing more than a case of harmless exaggeration or puffing. Obviously the sandpaper sequences were employed simply for the purpose of emphasizing and dramatizing the recog-

nized moistening or wetting properties of the cream. It is difficult to believe that anyone could have been misled as to the properties or qualities of the product."

We believe the examiner erred, his answers being wrong essentially because he asked the wrong questions.

IV.

Initially, we put to one side any question as to the truthfulness of the factual premise stated in the commercials, namely, that a shaving cream which enables sandpaper to be shaved cleanly and quickly is equally effective in shaving a man's beard. Respondents, who have spent many thousands of dollars in advertising this product to millions of viewers, apparently believed that the public would accept an equivalence of whiskers and sandpaper in this respect. Accordingly, giving respondents the benefit of any doubts we might otherwise have in the matter, we will assume the truthfulness of the commercials in so far [fol. 14] as they represented that if "Rapid Shave" can shave sandpaper, it "can do the same for you."

As the Commission saw and heard the television commercials here involved, they contain two other basic representations:

(1) When applied to coarse, gritty sandpaper, "Rapid Shave" will so moisturize the sandpaper that, immediately upon lathering, it can be cleanly shaved.

(2) As proof of that fact, the viewers need not take respondents' word for it; they can see with their own eyes a test or demonstration of how "Rapid Shave" actually shaves such sandpaper.

Despite respondents' contentions to the contrary, we are satisfied that the complaint was sufficiently clear and specific to bring both of these representations into issue. Thus, the record presents two questions, not one:

(1) Was there a misrepresentation as to the moisturizing qualities claimed for "Rapid Shave"? Specifically, can it "shave" sandpaper in the manner described in the commercials?

(2) Assuming that there was no misrepresentation as to the effectiveness of "Rapid Shave" in shaving sandpaper, was there nonetheless a misrepresentation in the visual demonstration offered as proof of such effectiveness? Specifically, was it deceptive to the public and an unfair advertising practice for respondents to conduct a "sandpaper" test before the viewers' eyes to prove the product's "super-moisturizing power" on what was represented as sandpaper, and what the viewers had every reason to suppose was sandpaper, but was actually a plexiglass mock-up?

We now proceed to consider both these questions.

[fol. 15] 1. On the premise—which we have assumed to be true—that there is an equivalence in this respect between sandpaper and "a beard as tough as sandpaper," if respondents misrepresented the extent to which "Rapid Shave," when applied to sandpaper, permits it to be shaved quickly and cleanly, they undoubtedly engaged in a form of conduct proscribed by the statute. Advertisers may not make claims for the efficacy of their products which exceed the bounds of truth and reality.[2] The Commission is obligated to prevent "false advertising of a product, process or method which misleads, or has the capacity or tendency to mislead, the purchasing public into buying such product, process or method in the belief it is acquiring one essentially different." *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175, 181 (C.A. 6), cert. denied, 314 U. S. 668. If the public is to be induced to purchase a shaving cream by representations as to its effect on sandpaper, those representations must be true.

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[2] See, *e.g.*, *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F. 2d 461 (C. A. 9), cert. denied, 361 U. S. 884; *Rhodes Pharmacal Co.* v. *Federal Trade Commission*, 208 F. 2d 382 (C. A. 7), modified, 348 U. S. 940; *Koch* v. *Federal Trade Commission*, 206 F. 2d 311 (C. A. 6); *American Medicinal Products, Inc.* v. *Federal Trade Commission*, 136 F. 2d 426 (C. A. 9); *Consolidated Book Publishers, Inc.* v. *Federal Trade Commission*, 53 F. 2d 942 (C. A. 7), cert. denied, 286 U. S. 553.

It was the uncontradicted testimony of an expert in coated abrasives and an official of respondent Bates that the plexiglass mock-up most closely resembled the grade of sandpaper commonly known as "extra-coarse." It is apparent to the Commission from its observation of the three commercials that this characterization in no way exaggerates the heavy, coarse appearance of the surface of the mock-up.

We find, upon review of the testimony, in conjunction with the sandpaper exhibits in the record, that:

(a) Sandpaper of the coarse, heavy variety depicted in the "Rapid Shave" commercials cannot suc-
[fol. 16] cessfully be shaved in the abbreviated time available during the commercials even by employing a number of strokes under heavy pressure;

(b) Sandpaper of the coarse, heavy variety depicted in these commercials cannot successfully be shaved within one to three minutes after application of "Rapid Shave," even by employing a number of strokes under heavy pressure;

(c) No piece of sandpaper of the coarse, heavy variety depicted in these commercials that appears in the record has been shaved genuinely clean, as the television mock-up was, despite the allowance of up to an hour for soaking in "Rapid Shave"; and

(d) One reason why real sandpaper was not used in the "Rapid Shave" commercials was that it required too long a soaking period before effective shaving was possible.

The Commission's conclusion on this issue, therefore, is that sandpaper cannot be shaved by applying "Rapid Shave" in the manner, and for the length of time, depicted in the commercials, and that respondents' representations and demonstrations to that effect were false, misleading, and deceptive.

This is not to deny that, as the examiner found, some types of sandpaper can, in some circumstances, be shaved with "Rapid Shave," "provided adequate time for soaking is allowed." But that is beside the point. There is a public interest in protecting the consumer from decep-

[fol. 17] tion,[3] and in furthering that interest the Commission is guided by the "net impression which the advertisement is likely to make upon the general populace," *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679 (C. A. 2), rather than "fine spun distinctions and arguments that may be made in excuse." *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 58 (C. A. 4). These commercials clearly conveyed the impression that very coarse grades of sandpaper could be shaved immediately after "Rapid Shave" was applied. As our brief summary of the evidence of record indicates, this is simply not possible. Every effort in the hearing room to shave heavy sandpaper shortly after it received a coating of "Rapid Shave" ended in total failure. And the pre-hearing experiments of witness Joseph R. O'Neil, an expert in the field of coated abrasives, involving soaking periods of one to three minutes, met with no more success.

Nor was the visual impact of respondents' "sandpaper" demonstration—an impact that was plainly the main object of each commercial—softened by the single unobtrusive utterance of the word "soak." According to respondents, that word "necessarily implies the passage of time," and its inclusion in the "audio" part of the commercial cancelled out any representation otherwise made as to the speed with which "Rapid Shave" could be used in shaving sandpaper. However, the viewer is almost unaware that the word has been spoken, and the action that accompanies it flows rhythmically along without discernible pause. The Commission observed these commercials with an educated eye, forewarned that, from respondents' standpoint, "soak" was a keyword in the announcer's spiel. Even so, the word failed to convey to us the impression that respondents' counsel urged for it. How much less a flag of caution must it have been to the unin-

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[3] See, *e.g.*, *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67; *Mohawk Refining Corp.* v. *Federal Trade Commission*, 263 F. 2d 818 (C. A. 3), cert. denied, 361 U.S. 814; *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 142 F. 2d 437 (C. A. 2), cert. denied, 323 U. S. 753; *Federal Trade Commission* v. *Balme*, 23 F. 2d 615 (C. A. 2), cert. denied, 277 U. S. 598.

itiate, gazing at their sets perhaps casually or distracted by other household activities. In these television commercials the pictorial demonstration was the thing,[4] and [fol. 18] the net effect of the spoken commentary was to accentuate rather than detract from it.

Respondents' arguments to the contrary are no more than technical quibbles over the breadth of the genus "sandpaper" and the dictionary definition of the word "soak." But the Commission is charged with the high duty of preventing public deception, and it must consider representations in actual context, not abstractly or in isolation, for "A statement may be deceptive even if the constituent words may be literally or technically construed so as to not constitute a misrepresentation." *Kalwajtys* v. *Federal Trade Commission*, 237 F. 2d 654, 656 (C. A. 7), cert. denied, 352 U. S. 1025.[5] The Commission is concerned with protecting the trusting as well as the suspicious, the casual as well as the vigilant, the naive as well as the sophisticated.[6] "It is for this reason that the Commission may 'insist upon the most literal truthfulness' in advertisements, *Moretrench Corp.* v. *Federal Trade Commission*, 2 Cir. 127 F. 2d 792, 795, and should have the discretion, undisturbed by the courts, to insist if it chooses 'upon a form of advertising clear

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[4] S. Watson Dunn, "Advertising—Its Role in Modern Marketing" (1961), p. 408: "Demonstration is so important it should be considered for every commercial. In many commercials demonstration of the product or service is the dominant theme. Since people are interested in what products will do for them, demonstration is usually good communication."

[5] And see, *Koch* v. *Federal Trade Commission*, 206 F. 2d 311, 317 (C. A. 6); *Bennett* v. *Federal Trade Commission*, 200 F. 2d 362, 363 (C. A. D. C.); *Rothschild* v. *Federal Trade Commission*, 200 U. S. 39, 42 (C. A. 7), cert. denied, 345 U.S. 941; *Bockenstette* v. *Federal Trade Commission*, 134 F. 2d 369, 371 (C. A. 10). *Cf.*, *Donaldson* v. *Read Magazine, Inc.*, 333 U. S. 178, 188.

[6] See *Niresk Industries, Inc.*, v. *Federal Trade Commission*, 278 F. 2d 337 (C. A. 7); *Parker Pen Co.* v. *Federal Trade Commission*, 159 F. 2d 509 (C. A. 7); *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103 (C.A. 7); *A. P. W. Paper Co.* v. *Federal Trade Commission*, 149 F. 2d 424 (C. A. 2), affirmed, 328 U. S. 193. *Cf.*, *Donaldson* v. *Read Magazine, Inc.*, 333 U. S. 178.

enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein." *Gen-*
[fol. 19] *eral Motors Corp.* v. *Federal Trade Commission*, 2 Cir., 114 F. 2d 33, 36, certiorari denied 312 U. S. 682. . . ." *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 680 (C. A. 2).

2. We turn next, to the contention mainly pressed on this appeal, namely, that use of the mock-up instead of real sandpaper in the demonstrations was not deceptive or misleading because it claimed no quality for "Rapid Shave" which it did not actually possess; and that, in any event, this was "little or nothing more than a case of harmless exaggeration or puffing" of the product's moistening properties.

This argument assumes, contrary to our findings of fact, that the commercials did fairly and truthfully describe "Rapid Shave's" effectiveness in shaving sandpaper. Even if that were so, the commercials would be deceptive, within the meaning of the statute, in the manner in which they deliberately misinform the viewer that what he sees being shaved is genuine "tough, dry sandpaper," rather than a plexiglass mock-up. There is no dispute that this is untrue. Did it tend to mislead the public, and was it an unfair advertising practice? We hold that it did, and it was.

If false advertising tends unfairly to divert business from competitors or to induce consumers to make purchases they might not otherwise make, it is certainly unlawful. The manner in which the mock-up was employed in the "Rapid Shave" commercials had the capacity to do both. Their entire sales pitch can be readily summarized:

> If you have a tough "sandpaper" beard, you need a shaving cream with super-moisturizing power. A shaving cream that is effective in quickly and cleanly shaving rough, dry sandpaper can do the same for your beard. RAPID SHAVE has such super-moisturizing power, *and we will prove it to you before your very eyes.*

The heart of these commercials was the visual "sandpaper test"—a test that was, in reality, not taking place.

[fol. 20] This would be deceptive and unfair advertising even if "Rapid Shave" was as effective in shaving sandpaper as respondents represented. A likely result of such an illegal practice is that "purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed. . . ." *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 217. "We are of opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial." *Ibid.*

Respondents urge, however, that if (assuming the fact to be true) their product will do to real sandpaper all that the mock-up demonstration claims for it, the consumer has not been induced to buy a product less valuable or meritorious than what he thought he was buying, and therefore he has not been hurt in any substantial way. But this has never been the test of what constitutes a material misrepresentation under the statute. "It is sufficient to find that the natural and probable result of the challenged practices is to cause one to do that which he would not otherwise do . . . and that the matter is of specific public interest." *Bockenstette* v. *Federal Trade Commission*, 134 F. 2d 369, 371 (C. A. 10). "It is not necessary that the product so misrepresented be inferior or harmful to the public; it is sufficient that the sale of the product be other than as represented." *L. & C. Mayers Co.* v. *Federal Trade Commission*, 97 F. 2d 365, 367 (C. A. 2).[7]

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[7] And see *C. Howard Hunt Pen Co.* v. *Federal Trade Commission*, 197 F. 2d 273, 280 (C. A. 3), in which petitioner represented that its pen points were tipped with iridium, an unusually hard element of the platinum family:

> "It is of no moment, in this proceeding in the public interest, that what the purchaser gets in the tipping material used on petitioner's pen points may be as serviceable as or almost as serviceable as iridium."

The court also pointed out that other manufacturers who tipped their pen points with the same hard material petitioner used and did not falsely claim that it was iridium were prejudiced by petitioner's misrepresentations.

[fol. 21] Respondents would have us hold that a television demonstration purporting to prove the qualities claimed for a product, where the public is told it is seeing one thing when it is actually seeing something different, is nonetheless lawful and not deceptive if in fact the product involved has the qualities claimed for it. This would flout the principles implicit in the multitude of cases which hold that one may not advertise so-called "phony" or dishonest testimonials;[8] or imply an erroneous source of origin for a product;[9] or fail to disclose that a product, although as good as a new one, has, in fact, been reprocessed;[10] or deceive the public into believing that one is in a certain line of business when this is not so.[11] The vice assailed in these cases is the use of falsification of fact, extrinsic to the objective value of the product, to sell that product, whether or not it may deserve to be bought on its own merits. "[T]he public is entitled to get what it chooses," and, "substitution would be unfair though equivalence were shown." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 77-78.

[fol. 22] Suppose, for example, that an advertisement for an obesity remedy shows the usual "before" and "after" pictures of users of the product. If those photographs

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[8] See, *e.g.*, *Niresk Industries, Inc.*, v. *Federal Trade Commission*, 278 F. 2d 337 (C. A. 7) (unauthorized use of "Good Housekeeping Guaranty Seal"); *Federal Trade Commission* v. *Standard Education Soc'y*, 86 F. 2d 692 (C. A. 2), modified, 302 U. S. 112 (Encyclopedia testimonials); *Guarantee Veterinary Co.* v. *Federal Trade Commission*, 285 Fed. 853 (C. A. 2) (U. S. Army endorsement and military testimonial for a livestock salt block).

[9] *E.g.*, *United States Navy Weekly, Inc.*, v. *Federal Trade Commission*, 207 F. 2d 17 (C. A. D. C.); *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429 (C. A. 4); *Federal Trade Commission* v. *Army and Navy Trading Co.*, 88 F. 2d 776 (C. A. D. C.).

[10] *E.g.*, *Mohawk Refining Corp.* v. *Federal Trade Commission*, 263 F. 2d 818 (C. A. 3), cert. denied, 361 U. S. 814; *Royal Oil Corp.* v. *Federal Trade Commission*, 262 F. 2d 741 (C. A. 4).

[11] *E.g.*, *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, *L. & C. Mayers Co.* v. *Federal Trade Commission*, 97 F. 2d 365 (C. A. 2); *Federal Trade Commission* v. *Mid West Mills, Inc.*, 90 F. 2d 723 (C. A. 7).

are "faked," it would obviously be no defense that the product is an effective appetite-depressant and could in fact bring about reduction in weight as represented in the "faked" pictures. The point is that the "proof" offered was a material element of the advertising; without it, the advertising might not have succeeded in selling the product; and in fact, the "proof" was not proof at all. The short of the matter is that the public and honest competitors are entitled to the protection which the law gives against such unfair and deceptive advertising practices.

In this case the pictorial test of "Rapid Shave," proving to any doubting Thomas in the vast audience that "By golly, it really *can* shave sandpaper!" was the clinching argument made by the commercials. The "sandpaper test" was conducted, as the announcer said, "[t]o prove Rapid Shave's super-moisturizing power. . . . ." Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product. At least, respondents must have thought so, or else they would not have emphasized the pictorial "sandpaper test" in the expensive television advertisements of their product. One need only consider the difference in the impact of these commercials on viewers had they been told, honestly and truthfully, that what they were seeing tested was a plexiglass mock-up rather than what they thought and were told they were seeing, namely, actual sandpaper. The difference between telling and not telling the truth could, in this instance at least, have been the difference between an effective and ineffective "sell." In such circumstances, the claim of "harmless exaggeration" is rather hollow.

Perhaps some consumers will be content with a product purchased in response to such a deceptive "come-on," but that is hardly legal justification for it. It could not atone, [fol. 23] for example, for the injury to a competing shaving cream manufacturer whose product might have fared better in the market place had respondents adhered to honest and fair advertising practices. "The law is violated if the first contact or interview is secured by deception. . . . ." *Carter Products* v. *Federal Trade Commission*, 186 F. 2d 821, 824 (C. A. 7).

V.

Respondents raise a number of specific defenses.

1. They suggest, first, that use of a plexiglass mock-up was justified because television's technical limitations cause sandpaper to look unreal when televised. We are told by respondents that the use of mock-ups or simulated props in television advertising is by no means unique to this case, and is a widespread practice in the industry. Thus, while the particular facts of this case may seem trivial, it raises the broad question whether mock-ups or simulated props may lawfully be used in television commercials to demonstrate qualities claimed for products, where the audience is told that it is seeing one thing being demonstrated while actually it is seeing something different.

As to the asserted technical limitations of the medium, the Commission is inclined to be somewhat skeptical. We doubt that the skills and resources available in television photography, in an industry which has made such striking technological advances in recent years, are as inadequate as they have been portrayed to us by counsel for respondents. However, assuming it to be the fact that there are indeed such limitations in television photography, the Commission can appreciate that these "technical" difficulties could give rise to problems for sponsors and agencies in determining how most effectively to use television in advertising their products. The limitations of the medium may present a challenge to the creative ingenuity and resourcefulness of copywriters; but surely they could not constitute lawful justification for resort [fol. 24] to falsehoods and deception of the public. The argument to the contrary would seem to be based on the wholly untenable assumption that the primary or dominant function of television is to sell goods, and that the Commission should not make any ruling which would impair the ability of sponsors and agencies to use television with maximum effectiveness as a sales or advertising medium.

Stripped of polite verbiage, the argument boils down to this: Where truth and television salesmanship collide, the former must give way to the latter. This is obviously an indefensible proposition. The notion that a sponsor

may take liberties with the truth in its television advertising, while advertisers using other media must continue to be truthful, is patent nonsense. The statutory requirements of truth in advertising apply to television no less than to other media of communication. Adherence to the truth should be no more of an impediment to effective advertising in television than in any other medium. But if, though we are inclined to doubt it, respondents do not believe they can effectively market their product on television within the legal requirements of truthful advertising, it does not follow that the Commission should relax those requirements. As was said in another case, if respondents "do not choose to advertise truthfully, they may, and should, discontinue advertising." *American Medicinal Products, Inc.* v. *Federal Trade Commission*, 136 F. 2d 426, 427 (C. A. 9). Only by disregarding this basic and salutary principle of the law could we give approval to respondents' advertising practices. "To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth." *Federal Trade Commission* v. *Standard Education Soc'y*, 302 U. S. 112, 116.

2. A kindred argument, of the "parade of horribles" variety, is that a decision against respondents in this case will disrupt the entire television industry by prohibiting [fol. 25] all future use, in all circumstances, of props to simulate reality. This is, of course, absurd. No one objects to the use of papier mâché sets to represent western saloons or an actor's drinking iced tea instead of the alcoholic beverage called for by the script. The distinction between these situations and the one before us is obvious. The set designer is not attempting, through his depiction of the saloon, to sell us a saloon, nor is the actor, sipping at his drink, peddling bourbon. There is a world of difference between a casual display of steaming "coffee" that is really heated red wine (again, because of television's "technical difficulties"), and a commercial showing a close-up of what is actually red wine to the accompaniment of a claim that the high quality of the sponsor's coffee is proved by its rich, dark appearance—which the viewer can verify for himself simply by looking at the "coffee" on the screen. Similarly, an announcer may wear a blue

shirt that photographs white; but he may not advertise a soap or detergent's "whitening" qualities by pointing to the "whiteness" of his blue shirt. The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not.

3. Resondents further contend, and the hearing examiner agreed, that, even if exaggerated, the claims for "Rapid Shave's" moistening ability, as asserted through the "sandpaper" demonstration, amount to no more than harmless "puffing." We cannot agree. Puffing "is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer, and on which no reasonable man would rely." *Prosser, Torts*, § 90, p. 557 (2d ed. 1955). Thus, sellers may generally, though not universally, assert that their products are "good," "wonderful," "dandy," and the [fol. 26] like,[12] but only because the use of these adjectives is "not designed to affect the intellect" but is "merely an accepted technique for urging the prospect to close the deal." Harper and McNeely, *A synthesis of the Law of Misrepresentation*, 22 Minn. L. Rev. 939, 1004-1005 (1938). The corollary of this proposition is that "puffing" does not embrace misstatements of material fact. At this point the law steps in to protect the buyer.[13]

> " 'Puffing' refers, generally, to an expression of opinion not made as a representation of fact. . . . . While a seller has some latitude in 'puffing' his goods, he is not authorized to misrepresent them or to assign to them benefits or virtues they do not possess." *Gulf Oil Corp.* v. *Federal Trade Commission*, 150 F. 2d 106, 109 (C.A. 5).[14]

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[12] See, *e.g.*, *Carlay* v. *Federal Trade Commission*, 153 F. 2d 493 (C. A. 7); *Prosser, Torts*, § 90, pp. 557-558 (2d ed., 1955); *Williston, Contracts*, § 1491 (1937 rev. ed., Williston and Thompson).

[13] See, *e.g.*, *Hogan* v. *McCombs Bros.*, 190 Ia. 650, 180 N. W. 770; *Foote* v. *Wilson*, 104 Kans. 191, 178 P. 430; *Cheetham* v. *Ferreira*, 73 R. I. 425, 56 A. 2d 861.

[14] See also, *Goodman* v. *Federal Trade Commission*, 244 F. 2d 584 (C. A. 9); *Steelco Stainless Steel, Inc.*, v. *Federal Trade Commission*, 187 F.2d 693 (C. A. 7).

In this context, the argument that respondents only indulged in a little harmless puffing is obviously out of place. They represented, unqualifiedly, that "Rapid Shave" will dramatically facilitate the shaving of sandpaper and that they were demonstrating this fact before a television audience to prove it. Both of these were factual representations; neither is true.[15]

[fol. 27] VI.

1. Respondent Bates raises several defenses pertaining to it alone. It suggests, first, that the Commission is without authority to enter an order against it because it is not engaged in commerce within the meaning of the statute. There is no dispute that Bates prepared and placed for showing, over national network television, these commercials for "Palmolive Rapid Shave," a product distributed in interstate commerce.[16] In light of the

[15] Respondents rely on *Carlay Co.* v. *Federal Trade Commission*, 153 F. 2d 493 (C. A. 7); *Kidder Oil Co.* v. *Federal Trade Commission*, 117 F. 2d 892 (C. A. 7); and *Ostermoor & Co.* v. *Federal Trade Commission*, 16 F. 2d 962 (C. A. 2). None is in point. In *Carlay* the court found that petitioner's weight-reducing plan actually was relatively "easy," as claimed. In *Kidder* the court concluded that it was permissible puffing to advertise that a lubricant was "perfect" and would permit a car to run an "amazing distance" without additional lubricants. These cases do not involve the kind of factual distortion presented here.

Nor are respondents aided by the langauage in *Ostermoor* concerning puffing. The court's remarks on puffing were only general observations as to the framing of an order, while reversal of the Commission's order was based on insufficiency of the evidence. Respondents thus err in construing *Ostermoor's* value as a precedent for this case. Furthermore, the interpretation which respondents urge for that case, and the result for which the contend here, are inconsistent with the prevalent judicial and administrative policy of restricting rather than expanding, so-called puffing. See, *e.g.*, *Kabatchnick* v. *Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 103 N. E. 2d 692; *Prosser*, Torts, § 90 p. 559 (2d ed. 1955); *Williston, Contracts*, § 1494, p. 4169 (1937 rev. ed., Williston and Thompson).

[16] Bates has, with commendable forthrightness, long since admitted these facts. See, *e.g.*, "Motion by Respondent Ted Bates & Company, Inc. to Dismiss the Complaint as to It upon the Ground That the Evidence Adduced Fails to Support the Charges Made in the Complaint," at p. 15.

precedents, one can hardly doubt the Commission's jurisdiction over an enterprise so basic to the flow of goods into the national market. It has been held, to cite a few representative examples, that Commission jurisdiction extends to businesses selling exclusively in intrastate commerce when they became participants in a combination to restrain interstate trade;[17] to regulations adopted by a local tobacco board of trade for the allotment of selling time to tobacco warehouses, since tobacco auctions are an integral part of interstate commerce in tobacco;[18] [fol. 28] to false and misleading representations made in an effort to obtain salesmen, because such representations constituted a part of the preliminary negotiations leading up to sales in interstate commerce and could not be separated from those sales;[19] and to a widely advertised automobile sales financing plan, even though it related solely to financing intrastate transactions between local dealers and their customers, because the plan and its advertising were an integral part of a national scheme of mass production and distribution.[20] The relation of Bates to the movement of goods in interestate commerce is no more tenuous or less direct than was the corresponding relation in any of the situations mentioned above.[21]

2. Bates argues additionally that it should not be held responsible for the illegality of the "Rapid Shave" com-

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[17] *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 695-696.

[18] *Ashville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission*, 263 F. 2d 502, 507-508. (C. A. 4).

[19] *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103, 105 (C. A. 7).

[20] *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175, 183 (C. A. 6), cert. denied, 314 U. S. 668.

[21] Bates' reliance on *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349, is misplaced. There the sole activity involved was the marketing of a product exclusively within the borders of a single state. Here respondent has prepared and placed advertisements knowing that they would be shown nationwide in the promotion of a product sold in interstate commerce. The *Bunte* case is thus not in point.

mercials, since it acted merely as an agent for Colgate-Palmolive in preparing and placing them. We find this a curious contention. Bates not only carried these commercials to the television network; it orginated the idea for the "sandpaper tests" in the first place.[22] We know of no doctrine that permits one to evade liability for actions for which he is as directly responsible as this; re- [fol. 29] gardless of whether he acted solely in his own interest or also for the benefit of another.[23] Bates' argument is merely another variation of the oft-repeated effort to avoid responsibility for a violation of the statute by shifting it to another. These attempts are uniformly unsuccessful. Thus, even though a respondent does not directly engage in unlawful activity, it may be held to have violated the Act if it has provided other with the means of doing so.[24] Even on an interpretation of the facts highly favorable to Bates, it has done at least this much. Or, to cite another instance, if a corporate officer has participated in the planning or execution of unfair trade practices by his corporate master, the status of the corporation as an independent legal entity is no barrier to an order running against him as an individual.[25] All that is necessary to establish liability in this type of case is that the corporate officer "be shown to have had such connection with the wrong as would have made him an accomplice were it a crime, or a joint tortfeasor, were the corporation an individual." *Federal Trade Commis-*

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[22] See "Motion by Respondent Ted Bates & Company, Inc.," *supra* note 16, at p. 18.

[23] In fact, the general rule seems quite to the contrary. See *e.g., American Law Institute, Restatement of Agency, Second,* §§ 343, 348, 350 (1958).

[24] See, *e.g., Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483; *C. Howard Hunt Pen Co.* v. *Federal Trade Commission,* 197 F. 2d 273 (C. A. 3).

[25] See, *e.g., Federal Trade Commission* v. *Standard Education Soc'y,* 302 U. S. 112; *Consumer Sales Corp.* v. *Federal Trade Commission,* 198 F. 2d 404 (C. A. 2), cert. denied, 344 U. S. 912; *Gelb* v. *Federal Trade Commission,* 144 F. 2d 580 (C. A. 2); *Guarantee Veterinary Co.* v. *Federal Trade Commission,* 285 Fed. 853 (C. A. 2).

sion v. *Standard Education Soc'y*, 86 F. 2d 692, 695 (C. A. 2), modified, 302 U. S. 112. The facts leave no doubt that Bates' part in the creation and dissemination of the "Rapid Shave" commercials satisfies this test.

3. Bates has suggested that these principles are inapplicable to it because it did not know its "sandpaper test" [fol. 30] commercials would be held to be false and misleading, and it therefore did not intentionally violate the Act. It is so well settled that there is no necessity to prove intent to deceive in establishing a violation of the Act [24] that this contention can only be regarded as frivolous.

VII.

We arrive finally at the question of the scope and content of the order to be issued against Colgate-Palmolive and Ted Bates. Respondents were apprised of the order proposed by counsel supporting the complaint as early as March 20, 1961, when it was filed with the Secretary of the Commission. The question was raised and discussed on April 6, 1961, in oral argument before the hearing examiner. Counsel for all parties argued the matter in their briefs on appeal, and the subject was considered again in oral argument before the Commission. Respondents have thus not only had fair notice and ample opportunity to make known their views concerning the breadth of the order; they have done so. The Commission has carefully considered all of respondents' views and objections to the form, content, and scope of the proposed order and is fully justified in promulgating its order without further delay.

The appropriate scope of the order must be determined in the context of the statute and the authoritative precedents. Section 5 of the Act states that "Unfair *methods* of compeition in commerce, and unfair or deceptive

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[24] See, *e.g.*, *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67; *Koch* v. *Federal Trade Commission*, 206 F. 2d 311 (C. A. 6); *Gimbel Bros., Inc.*, v. *Federal Trade Commission*, 116 F. 2d 578 (C. A. 2); *L. & C. Mayers Co.* v. *Federal Trade Commission*, 97 F. 2d 365 (C. A. 2).

acts or *practices* in commerce, are declared unlawful" (emphasis added). 15 U. S. C. § 45(a)(1). It empowers the Commission to prevent parties within its jurisdiction "from using unfair *methods* of competition in commerce [fol. 31] and unfair or deceptive acts or *practices* in commerce" (emphasis added). 15 U. S. C. § 45(a)(6). It further declares that, if the Commission finds that the method of competition or act or practice in question is of the prohibited sort, it shall issue an order requiring the respondent "to cease and desist from using such *method* of competition or such act or *practice*" (emphasis added). 15 U.S.C. § 45(b). The clear implication of this language—especially in its differentiation between "acts" and "practices"—is that the Commission's authority to ascertain and prevent violations of the statute extends beyond the unique facts of a given case to the more general and significant problem of the "method" of competition or trade "practice" involved.

The cases bear out this interpretation. The courts have given the Commission broad authority to tailor the remedy to the violation found.[27] The language of the cases, like the statute, has always employed the generic term "practices," and it has frequently been made clear that the Commission's authority—indeed, its obligation—in framing an order extends to the prevention of unfair

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[27] For example:

> "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. Moreover, '[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices' disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U. S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' Id., at 613." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473.

types or forms of conduct rather than merely isolated [fol. 32] acts.[28] For the reasons set forth below, we think the public interest compels the entry of an appropriately broad order here.

This case did not come to us vacuum-packed. The violations of law found here cannot be treated as isolated, discrete phenomena. As has already been noted, the problem of deceptive television advertising, although recent in origin, is making its appearance on the Commission's docket with increasing frequency. Although most of the cases have ended in orders based on consent agreements [29] reciting, as is customary, that respondents in no way admit illegality, they nonetheless indicate the prevalence and growing seriousness of the problem. It is a problem with which both respondents have had prior ex-

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[28] For example:

> "[T]he Commission's power would be limited indeed if it were restricted to enjoining unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial function." *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F. 2d 968, 971-972 (C. A. 3).
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> "Commission orders are not designed to punish for past transgressions, but are designed as a mean for preventing 'illegal practices in the future.' Federal Trade Commission *v.* Ruberoid Co., supra, 343 U. S. at page 473. . . . To the end that the Commission may achieve that purpose, its orders may prohibit not only the further use of the precise practice found to have existed in the past, but also, the future use of related and similar practices." *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 343 (C. A. 7).

[29] *Menne[illegible] Co.*, D. 8146, May 4, 1961; *Aluminum Company of America*, D. 7735, March 4, 1961; *Eversharp, Inc.*, D. 7811, Sept. 30, 1960; *Standard Brands, Inc.*, D. 7737, June 1, 1960; *Brown & Williamson Tobacco Co.*, D. 7688, Feb. 24, 1960; *Max Factor & Co.*, 55 F. T. C. 1328; *Adell Chem. Co.*, 54 F. T. C. 1801; *American Chicle Co.*, 54 F. T. C. 1625; *Lanolin Plus, Inc.*, 54 F. T. C. 446. Two cases, *Colgate-Palmolive Co.*, D. 7660, March 9, 1961; and *Hutchinson Chemical Corp.*, 55 F. T. C. 1942, have been fully litigated before the Commission.

[fol. 33] perience.[30] Against this factual background, the Commission would be derelict in its duty to protect the public if the order were confined merely to advertisements for "Rapid Shave" or to the use of mock-ups made of plexiglass and sand. So narrow a conception of the appropriate scope of the remedy in this type of case would necessitate a separate suit to terminate each of the myriad subtly distinct forms that deceptive depictions and demonstrations may take—an intolerable result from the standpoint of the public interest. Rather, in the face of widespread and increasing use of deceptive and unfair advertising practices in television,[31] we are "obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices." *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 430. We can achieve this end simply by following the words of the statute and banning repitition of the "practice" found unlawful. That is a narrower and more limited prohibition than the Supreme Court has already upheld in affirming the Commission's authority, "as a prophylactic and preventive measure," to enjoin not only the practices found to be violations but also other "like and related" practices. *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U. S. 385, 393.

We conclude that the order cannot be confined to a single product or a single means of deception. We think, however, that counsel supporting the complaint ask for too much when they seek, in addition to a ban against [fol. 34] false and deceptive depictions and demonstrations, a prohibition against "[m]isrepresenting in any

[30] As to Colgate-Palmolive, see *Colgate-Palmolive Co.*, D. 7650, March 9, 1961. As to Ted Bates, see *Standard Brands, Inc.*, D. 7737, June 1, 1960; *Brown & Williamson Tobacco Co.*, D. 7688, Feb. 24, 1960.

[31] Besides the many that have come to our attention as the result of applications for complaints and our own investigations, we are informed by counsel for respondents that use of mock-ups in television commercials, apparently indiscriminately, is common practice.

manner the quality or merits of any . . . product." [22] So broad and indefinite a command would be most difficult to obey, even in the best of faith, and it will be omitted from the order. We think a more narrow and specific prohibition should suffice here. Accordingly, our order will—in addition to the provisions already discussed—prohibit, in general, the misrepresentation of the quality or merits of "Rapid Shave," or any other shaving cream.

In sum, we have carefully considered the form, scope, and content of the order and are fully satisfied that it is fair and reasonable, necessary and appropriate to prevent recurrence of the illegal practices, sufficiently specific and concrete to permit ready compliance, and no broader than protection of the public requires.

December 29, 1961.

[22] "Proposed Findings, Conclusions and Order" of Counsel Supporting the Complaint, at p. 10.

[fol. 35] * * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 5972.

COLGATE-PALMOLIVE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 5986.

TED BATES & COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

DECREE—November 20, 1962

This cause came on to be heard on petitions for review of an order of the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Fed-
[fol. 36] eral Trade Commission is set aside. Further proceedings are to be in accordance with the opinion filed this day.

By the Court:

ROGER A. STINCHFIELD, Clerk.

By: /s/ DANA H. GALLUP,
Chief Deputy Clerk.

* * * *

[fol. 37]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 5972.

COLGATE-PALMOLIVE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 5986.

TED BATES & COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petitions to Review an Order of the Federal Trade Commission.

Before WOODBURY, Chief Judge and HARTIGAN and ALDRICH, Circuit Judges.

MATHIAS F. CORREA, with whom ARTHUR MERMIN, CORYDON B. DUNHAM, JOHN F. GRODEN, CAHILL, GORDON, REINDEL & OHL and WITHINGTON, CROSS, PARK & MCCANN were on brief, for petitioner in No. 5972.

JOSEPH A. MCMANUS, with whom LANE MCGOVERN, COUDERT BROTHERS and ROPES & GRAY were on brief for petitioner in No. 5986.

MILES J. BROWN, Attorney, with whom JAMES MCI. HENDERSON, General Counsel, J. B. TRULY, Assistant General Counsel, and FREDERICK H. MAYER, Attorney, were on brief, for respondent.

[fol. 38]

OPINION OF THE COURT—November 20, 1962

ALDRICH, Circuit Judge. These petitions to review and set aside a cease and desist order of the Federal Trade Commission are noteworthy principally because of the extremes to which the dispute has led the parties. We shall refer to the petitioners as they were below, viz., as respondents. Respondent Colgate-Palmolive Company with the aid and at the suggestion of its advertising agency, respondent Ted Bates & Company, in 1959 released three substantially similar television commercials (hereinafter referred to in the singular) to advertise the "moisturizing" qualities of Colgate's pressurized [1] shaving preparation Palmolive Rapid Shave, hereinafter the cream. The commercial was a dramatic "audio" and "video" exposition in which sandpaper was apparently shaved with a safety razor with a single stroke immediately following the application of the cream. This demonstration, it was vocally claimed, "proved" the moisturizing qualities of the cream and that it would have the same effect "for you." In fact the demonstration did not employ sand paper at all, but a simulated mock-up of sand on plexiglass. The Commission brought a civil complaint against respondents, charging misrepresentations in that ". . . said visual demonstration was a 'mock-up' . . . [and] does not prove the 'moisturizing' properties of Palmolive Rapid Shave, in actual use, for shaving purposes." Respondents' answers admitted that the demonstration was a mock-up, but asserted that the "commercials contained a fair and true illustration of the otherwise proven fact that Palmolive Rapid Shave has excellent 'wetting' qualities." Following a trial the [fol. 39] Commission issued a broad order against both respondents of which they now seek review.

Respondents' first defense is that the cream did in fact permit the shaving of sandpaper as apparently shown, so that there was no misrepresentation. This

[1] See *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 4 Cir., 1959, 269 F.2d 299.

claim is conspicuously lacking in merit. Ordinary coarse sandpaper can be shaved, but not until the cream has remained upon it for upwards of an hour. Even if we could assume that a particularly fine grade of paper, described as "finishing paper," could fall within the common understanding of what the audio portion described as "tough" [2] sandpaper, which we may doubt, and even if the visual demonstration, which was clearly of a coarse [3] brand of sandpaper, did not conclusively foreclose that assertion in this case, which we doubt even more, respondents are not aided. Their best evidence was that even finishing paper required that the cream rest upon it for one to three minutes before shaving was possible. The video portion of the demonstration shows no such inconvenient wait, but graphically exhibits no pause or break between the application of the cream to the paper, the reaching for the razor, and the shaving operation. It is true that the accompanying audio portion of the commercial uses the word "soak." Respondents contend that soaking means an appreciable passage of time. The Commission was well warranted in finding that the word "soak" was so unobtrusive that many viewers might not notice it, and that even those who did [fol. 40] might conclude that the length of the announced soaking was not one to three minutes or more, but the insignificant interval defined by the visual portrayal, the same as was shown for "soaking" the human beard.[4] It

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[2] Respondents object to the Commission's reference to the adjective "tough" because it was not specifically mentioned in the complaint, and elsewhere make other, similar, objections. There was no dispute as to what was in the commercial. We can not think the complaint had to set worth every word.

[3] Counsel for respondents claim that the purported sandpaper looked coarser on the movie exhibit introduced in evidence by the Commission than it appeared to the television viewers. Apart from the absence of evidentiary support for this contention, it is pointless in the light of the candid testimony of one of Bates' employees that the commercial's sandpaper appeared coarser than the finishing paper on which respondents rely.

[4] Respondents do not make the contrary suggestion that beards, too, must be soaked for one to three minutes. Indeed, they could not, without making the picture a serious misrepresentation in another respect.

should be obvious by now to anyone that advertisements are not judged by scholarly dissection in a college classroom. *F. T. C.* v. *Standard Education Society*, 1937, 302 U. S. 112, 116; *Aronberg* v. *F. T. C.*, 7 Cir., 1942, 132 F. 2d 165.

Respondents next contend that the length of time required to shave sandpaper was not within the pleadings. We agree with them that the Commission did not happily phrase its order denying a motion to amend the complaint. Although respondents predicate some argument on this denial, which the Commission might well have anticipated, one may nevertheless question how seriously they were misled into thinking the issue was simply whether sandpaper of a variety not depicted could eventually be shaved, when the complaint plainly charged that the "commercials, which include a visual demonstration . . . represented, directly or by implication, that . . . it is possible to forthwith shave off the rough surface of said sandpaper . . ." More important, respondents have not been able to suggest to us how, in the light of the evidence which they introduced after a suitable interval to prepare against the Commission's showing, they have been prejudiced. Rather, we think they are simply trying to restrict the issue to one they might be able to meet, instead of one they plainly cannot. The Commission rejected this attempt, and we agree.

Next, respondents assert that the commercial, even if not true with respect to sandpaper, was mere metaphorical puffing; that there is no contention that the cream [fol. 41] did not possess entirely adequate moisturizing properties for shaving humans (the Commission makes no claim of inadequacy of the cream); that no one bought the cream intending to shave sandpaper, and that therefore there was no misrepresentation as to any material matter. Within limits we are sympathetic with the principle allegedly underlying respondents' contention. Graphic visual demonstrations that have dramatic appeal may well be mere puffing. References to sandpaper beards may of themselves be harmless, and so may be pictures illustrating the analogy. We see no

objection to obvious fancy, provided there is no underlying misrepresentation. But respondents' difficulty is that they do not come under any such principle. They went far beyond generalities and eye-catching devices into asserting as a fact that the cream enables sandpaper to be shaved forthwith, and that this fact "proved" the cream's properties for shaving humans. They cannot now suggest that ability to shave sandpaper forthwith was an irrelevant fact and an irrelevant representation.[5] We agree with the Commission that it is immaterial that the cream may in fact have adequate shaving qualities. If a misrepresentation is calculated to affect a buyer's judgment it does not make a fair business practice to say the judgment was capricious. *Mohawk Refining Corp.* v. *F. T. C.*, 3 Cir., 1959, 263 F. 2d 818, *cert. den.* 361 U. S. 814; *C. Howard Hunt Pen Co.* v. *F. T. C.*, 3 Cir., 1952, 197 F. 2d 273.

It may well be that little injury was done to the public by respondents' representations. We suggested in our opening sentence that we consider this a rather trivial case. Nonetheless, we could not possibly say that it was not within the province of the Commission to conclude that such conduct should be forbidden. Colgate's motion to dismiss the complaint was properly denied.

[fol. 42] Respondent Bates contends that as a mere advertising agency no order should be entered against it in any event. On one occasion the Commission has drawn such a distinction on the ground that the agency was but a secondary actor. This ruling, however, was expressly stated to be a matter of "sound discretion." *Bristol-Myers Co., et al.*, 1949, 46 F.T.C. 162, 176. Where, as here, the Commission was warranted in finding that the advertising agency was an active, if not the prime, mover, we could not say that the Commission lacked either jurisdiction or discretion. *Cf. C. Howard Hunt Pen Co.* v. *F.T.C.*, *supra* at 281; *Chas. A. Brewer & Sons* v. *F.T.C.*, 6 Cir., 1946, 158 F.2d 74;

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[5] The Commission makes an interesting counter-suggestion. If shaving sandpaper did *not* prove something about shaving humans, was there not a still further misrepresentation?

see also *National Cash-Register Co.* v. *Leland*, 1 Cir., 1899, 94 Fed. 502, 507 *cert. den.* 175 U.S. 724.

Very different questions, however, arise when we come to the scope of the order. The interdiction of which respondents principally complain prohibits the following:

> "Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations depictions or demonstrations of, or do not prove the quality or merits of, any such product."

Analysis of this portion of the order shows it to be quite ambiguous. On first reading we had thought that, in effect, it simply forbade demonstrations which represented a product as doing something that it could not do, or as appearing to have qualities which it did not possess. There could be no objections to such an order, except respondents' special objection that this particular [fol. 43] one embraces too many products. But respondents say that the language goes far beyond such conduct, and would prohibit any demonstration even if it did not misstate facts about, or misrepresent the appearance of, the product, if it was not "genuine" in that the actual substance used in the studio, because of technical problems of photography, was not the product itself. In other words, it would be no defense that, as the examiner found on undisputed testimony here, the shaving of sandpaper, even when in fact accomplished, does not properly reproduce on television and must be simulated to be effective. Similarly, it appears that coffee, orange juice and iced tea lose their true colors, so that artificial substances have to be substituted to make them look natural, while in another area products such as ice cream and the "head" on beer melt under the hot

camera lights and require the use of more stable substitutes. On consideration we agree with respondents that the order may be read as forbidding such conduct. Furthermore, we believe that this was the Commission's intention.[6] In its opinion accompanying the order the Commission stated that one of the issues was whether, even if the cream permitted the shaving of sandpaper precisely as pictured, there was "nonetheless a misrepresentation . . . and an unfair advertising practice." The Commission resolved this issue by concluding that it was "an illegal practice," and was likely to deceive the public and cause purchasers to buy what otherwise they would not have bought.[7]

[fol. 44] We, of course, agree with the Commission that there is a misrepresentation, of a sort, in any substitution case. But we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see not by the means. We suggested to counsel that this could be readily tested. Suppose, in the case of color television, a milk producer wishes to advertise the rich quality of his

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[6] Indeed, the Commission seemed eager to raise this question. For example: "Thus, while the particular facts of this case may seem trivial, it raises the broad question whether mock-ups or simulated props may lawfully be used in television commercials to demonstrate qualities claimed for products, where the audience is told that it is seeing one thing being demonstrated while actually it is seeing something different."

[7] To be doubly sure our understanding of the Commission's position was correct, we put the following case to its counsel. Suppose a prominent person is photographed saying, "I love Lipsom's iced tea," while, apparently, he drinks a glass of iced tea. In truth the individual does like Lipsom's tea, and frequently drinks it, but for the above-mentioned technical reasons is then drinking colored water. What the viewer sees on the screen looks exactly as Lipsom's iced tea does in fact look. Asked if this would be misconduct, counsel replied that it was the Commission's position that it would be, because the viewer had been led to believe he is seeing iced tea when in fact he is not.

cream. Obviously he cannot use a foreign substance so that his product will appear yellower and richer than it is. But, equally should he be allowed to use his own cream if he knows that by the normal photographic process its color would be changed so as to appear substantially better on the screen than it was? We suspect the Commission would think it clear he could not. Yet if he used an artificial substance in order to produce the exactly correct appearance, under the Commission's rule there would be deceit. Counsel gave no answer. We are not critical of counsel, because we think his client has left him without one.[8]

The Commission has confused two entirely different situations. Of course, as we have already said, if a purported demonstration attributes to a product quali- [fol. 45] ties it does not in fact possess, the advertiser will not be permitted to say that the product can still do all it needs to do, or is "just as good" even though it does not have the claimed characteristic. The Commission properly said that the customer is entitled to get what he is led to believe he will get, whether he is right or wrong in thinking it makes a difference.[9] But where

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[8] We realize that counsel might have replied that products which do not photograph accurately should never be represented. This would seem—at least to those who use television commercials—a drastic remedy. We believe the burden should be on the Commission to demonstrate an equivalent need.

[9] The Commission also relied on what it called "phony" testimonial cases. *F. T. C.* v. *Standard Education Society, supra,* at 118; *Niresk Industries, Inc.* v. *F. T. C.*, 7 Cir., 1960, 278 F.2d 337, *cert. den.*, 364 U.S. 883. We would agree that it is an unfair advertising practice to publish a purported testimonial when none had been received, even if, from the fact that the advertiser's sales were high and constant, it must be obvious that he has many satisfied customers. A more accurate analogy would be if the advertiser did in fact receive a testimonial, but written in ink that would not photograph. Would the advertiser be guilty of deceit if he copied it over and photographed the copy? If an endorser may not be shown enjoying colored water that looks like, but is not, iced tea, then, seemingly, it would not be "genuine" to photograph a copy of a testimonial leading viewers to believe it was an original document. It is difficult to think the Commission fully appreciated the principle it has espoused.

the only untruth is that the substance he sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit.

The present order must be set aside. We do not, of course suggest that it was erroneous in every particular, but the Commission's fundamental error so permeates the order that we think it best that an entirely new one be prepared. We also think it best that the Commission be the one to do so. We will make, however, two suggestions. The Commission has directed this part of its order to every kind of product that Colgate may hereafter advertise, and, in the case of Bates, with regard [fol. 46] to every customer. If mock-ups, or what the Commission chooses to call demonstrations that are not "genuine," were illegal per se, then it might be appropriate, although we need not decide, to enter a broad order forbidding all such demonstrations en masse. We have undercut the basis for any such order. Under our construction there is no showing of any "method" or "practice" in the sense discussed by the Commission in its opinion. Respondents' only offense was the making of a single misrepresentation about a single product. The fact that this was accomplished by a "demonstration" did not warrant a broad order against all future misrepresentations of any kind by demonstrations any more than the fact that a misrepresentation was made in print would justify an order against all future misrepresentations of any kind by printing. The Commission has revealed that it is well aware of the scope to be applied to single misrepresentations, and we need say no more on this subject. See *e.g.*, *Colgate-Palmolive Co.*, Docket No. 7660, March 9, 1961, Trade Reg. Rep., (1960-61 Transfer Binder) ¶ 29445.

Secondly, with respect to the respondent Bates, we think there may well be distinction between a principal and an agent in the permissible scope of an order. In

some degree a principal may well be held to advertise at his peril. But we have reservations as to how far it is appropriate to go in the case of an agent, in the absence, at least, of any suspicion on its part that the advertisement is false. *Cf. Bristol-Myers Co., supra.*

Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion.

[fol. 47]

* * * *

BEFORE
FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman,
SIGURD ANDERSON,
PHILIP ELMAN,
EVERETTE MACINTYRE,
A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and TED BATES & COMPANY, INC., a corporation.

Order Providing for the Filing of Exceptions to Proposed Final Order.

IT IS ORDERED that respondents may, within twenty (20) days after service upon them of this order and the attached opinion of the Commission, file with the Commission their exceptions to any provisions of the Proposed Final Order, a statement of their reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision; and that complaint counsel may, within ten (10) days after service of respondents' exceptions, file a statement in reply thereto.

[fol. 48] IT IS FURTHER ORDERED that if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Proposed Final Order shall then become the final order of the Commission.

PROPOSED FINAL ORDER.—Issued February 18, 1963

IT IS ORDERED that respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representa-

tives, and employees, directly or through any corporate device, do forthwith cease and desist from using the following methods of competition or acts or practices in commerce, as "commerce" is defined in the Federal Trade Commission Act:

1. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because a mock-up or substitute material or article is used in the test or demonstration instead of the genuine material or article represented to be used therein.

2. Advertising Rapid Shave or any other shaving cream by claiming for it qualities or merits that the product does not in fact possess.

IT IS FURTHER ORDERED that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate device, do forthwith cease and desist from engaging in the following methods of competition or acts or practices in commerce, as "commerce" is defined in the Federal Trade Commission Act:

1. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or [fol. 49] demonstration does not constitute actual proof because a mock-up or substitute material or article is used in the test or demonstration instead of the genuine material or article represented to be used therein.

2. Advertising Rapid Shave or any other shaving cream by claiming for it qualities or merits that the product does not in fact possess, unless respondent shows that it neither had knowledge of the falsity of such representation nor had any reason to question its truthfulness.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service upon them of this order,

file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioners Anderson and Higginbotham concurring in the result.

SEAL

JOSEPH W. SHEA,
JOSEPH W. SHEA,
Secretary.

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[fol. 50] * * * *

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman,
SIGURD ANDERSON,
PHILIP ELMAN,
EVERETTE MACINTYRE,
A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation and TED BATES & COMPANY, INC., a corporation.

OPINION OF THE COMMISSION ON REMAND—February 18, 1963

By Commissioner Elman:

This case is again before the Commission, on remand from the Court of Appeals for the First Circuit.

On December 29, 1961, the Commission, finding that Colgate-Palmolive Company and its advertising agency, Ted Bates & Company, Inc., had violated Section 5 of the Federal Trade Commission Act issued a cease and desist order against them. The Commission found that respondents, in numerous television commercials adver- [fol. 51] tising the moisturizing qualities of Colgate's Rapid Shave cream, engaged in two distinct unfair and unlawful practices and methods of competition: (1) misrepresenting the qualities or merits of the product; and (2) using a sham demonstration purporting to prove a claim made for the product but which, because of the undisclosed substitution of a mock-up, did not in fact prove the claim. Our order was designed to prohibit respondents from continuing to engage in both of these illegal forms of advertising.

As to the first practice prohibited by the Commission's order, i.e., misrepresentation of the qualities of shaving

cream products, the Court of Appeals in its opinion of November 20, 1962, sustained the Commission's decision, apparently in all respects. However, with respect to the second practice, i.e., the use of spurious television commercial demonstrations, the Court found the apparent reach of our order to be ambiguous. On the basis of an interpretation of the order it believed to be supported by our previous opinion and by certain statements made by Commission counsel during the oral argument of the appeal, the Court held that the order was permeated by "fundamental error" and went too far in prohibiting practices that do not violate Section 5. The case was accordingly remanded to permit the Commission to formulate a new order (310 F. 2d 89).

The appellate proceedings in this case demonstrate once again the imperative need for explicitness in administrative adjudication. An agency whose actions are subject to appellate review must always be mindful of its duty to the reviewing court to express clearly both the rationale and the bounds of its decision. As Mr. Justice Cardozo put it, the court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago M., St. P.,* [fol. 52] *& P. R. R.*, 294 U. S. 499, 511 (1935); and see *SEC* v. *Chenery Corp*, 318 U. S. 80, 94 (1943).

Reexamined in the light cast by the opinion of the Court of Appeals, the Commission's previous opinion and order in this case—to the extent that they dealt with respondents' practice of presenting spurious demonstrations in their television commercials—appear to have been wanting in the necessary clarity. Our opinion failed to spell out sufficiently the theory of law on which the order was based, and the prohibitions contained in the "demonstration" part of the order were not defined with sufficient precision. For that reason, it would clearly be inappropriate for the Commission to seek Supreme Court review of this case in its present posture. We believe it would be more orderly, less productive of delay, and in the public interest for the Commission now to remove the defects in its order found by the Court

of Appeals, so that if there should be occasion for further judicial review, it will not be clouded by uncertainty as to the basis and breadth of our decision.

On this remand the Commission has undertaken to reconsider the entire case, and to formulate a new order in light of the various suggestions contained in the opinion of the Court. These suggestions have been carefully considered by the Commission and in substantial part have been accepted and incorporated in our order. In one respect (relating to the application to Bates of that part of the order prohibiting misrepresentation of the qualities or merits of shaving cream products), we have added a protective qualification beyond that suggested by the Court.

I.

At the outset, we must emphasize what this case does and does not involve. The basic facts have never been in dispute. Respondents, in their television commercials [fol. 53] for Rapid Shave, were not content merely to claim that its "super-moisturizing power" was so great that it could shave sandpaper. Had the commercials been limited to that claim, the case would have raised only the narrow factual issue of its truthfulness. Respondents saw fit to go much further and to "prove" the claim by "demonstrating" this purported quality of the product to the viewing public. Respondents were evidently aware that many viewers might not be willing to take their word for it that Rapid Shave could shave sandpaper. For those skeptical viewers, additional proof of the truthfulness of the claim was apparently thought necessary in order to sell the product. Respondents sought to exploit the popular belief that "the camera doesn't lie." By means of the "sandpaper test" demonstration, respondents in effect stated to the viewing public: "Do you doubt that Rapid Shave really can shave sandpaper, and suspect that we may be exaggerating its merits? Well, see for yourselves, and your doubts will disappear. Here is a piece of tough, dry sandpaper. Look at how quickly and cleanly Rapid Shave shaves it. And Rapid Shave can do the same for you, even if your beard is as tough as sandpaper."

As stated in our previous opinion, "The heart of these commercials was the visual 'sandpaper test'—a test that was, in reality, not taking place. * * * [T]he pictorial test of Rapid Shave, proving to any doubting Thomas in the vast audience that 'By golly, it really *can* shave sandpaper!', was the clinching argument made by the commercials. * * * Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product."

Respondents did not present a fictional dramatization, obvious to viewers as such, of the claim being made for the product. Had they done so, an entirely different case would have been before us. But when a seller offers what he represents to be "documentary proof", he can [fol. 54] hardly claim the privilege of dramatic license. Respondents presented what appeared to viewers and was described as a "test" or visual proof, which each viewer could verify with his own eyes, of the truth of their claim that Rapid Shave's moisturizing qualities enabled it to shave tough, dry sandpaper cleanly and immediately upon lathering. In fact, however, the "sandpaper test" was a hoax; the "proof" was not proof at all; and the "demonstration" demonstrated only how far some marketers feel they can go in "hard sell" advertising. As respondents have freely conceded, the material they affirmatively represented in the "test" to be "tough, dry sandpaper" was not sandpaper but a mock-up of loose sand spread on Plexiglas.

II.

Having put to one side the finding of fact that sandpaper cannot be shaved clean upon the application of Rapid Shave in the manner depicted and described in the demonstration, the Commission held that even if Rapid Shave could shave sandpaper as represented, respondents' "sandpaper test" demonstration, being spurious, was an unfair and unlawful method of advertising. We held that when an advertiser purports to prove the existence of a quality claimed for his product by staging a sham test or demonstration that actually proves nothing, and the "demonstration" is material in affecting the judg-

ment of buyers, the advertiser cannot defend the practice on the ground that the product in fact possesses the claimed quality.

In setting aside the Commission's order, the Court of Appeals held that it was susceptible of being interpreted to prohibit indiscriminately the use of mock-ups or substitute materials in all television commercials in every conceivable hypothetical situation. We agree that such an interpretation of our order would exceed its intended scope.

[fol. 55] The Commission did not have before it any abstract question whether the use of mock-ups in television advertising is, in all circumstances, *per se* illegal; or whether, in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen because of technical deficiencies in the photographic process, it is permissible to use substitute materials to overcome those deficiencies. Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying "I love Lipsom's tea", assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product.[1]

That the "sandpaper test" was calculated to affect the judgment of prospective buyers is beyond doubt. Respondents, who allocated so much of their television advertising

[1] We also agree with the Court of Appeals that where "products such as ice cream and the 'head' on beer melt under the hot camera lights and require the use of more stable substitutes", there could be no objection to the use of such substitutes in casual or incidental displays of the product, so long as the commercial does not seek thereby to prove visually the longevity or fine appearance of the product.

to these bogus demonstrations, cannot dismiss them now on the ground that they were so ridiculous that nobody could have been influenced by them to chose Rapid Shave over a competitor's product. As the Court of Appeals pointed out, respondents' advertising "went far beyond generalities and eye-catching devices into asserting as a [fol. 56] fact that the cream enables sandpaper to be shaved forthwith, and that this fact 'proved' the cream's properties for shaving humans. They cannot now suggest that ability to shave sandpaper forthwith was an irrelevant fact and an irrelevant representation. We agree with the Commission that it is immaterial that the cream may in fact have adequate shaving qualities. *If a misrepresentation is calculated to affect a buyer's judgment it does not make it a fair business practice to say the judgment was capricious.*" (Emphasis added.)

III.

With this ambiguity in our order resolved, we shall restate the factual and legal basis for our conclusion that it is unlawful for advertisers to stage television commercial demonstrations that purport to—but do not in fact, because of the undisclosed use of mock-ups or substitute materials—prove visually a quality or merit claimed for a product, regardless whether the product actually possesses such quality or merit.

The principle upon which the Commission decided this case is elemental in the law of unfair competition: A seller may not resort to material falsehoods in order to induce sales of his product;[2] and a misrepresentation may

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[2] In Section 15 of the Federal Trade Commission Act, in defining false advertising for the purposes of Section 12 of the Act covering foods, drugs, devices and cosmetics, Congress specifically spelled out the basic proposition underlying the whole Act that a false advertisement is one that is "*misleading in any material respect . . .*" (emphasis added). The validity of the complaint in this case, though expressly predicated on Section 5, may also be sustainable under Section 12, though the later is not specifically cited therein. Cf. *Williams* v. *United States*, 161 U. S. 382 (1897). There can be no question that an advertisement that is "false" under Section 12 also violates the more general and comprehensive provisions of Section 5. See Note, *The Regulation of Advertising*, 55 Colum. L. Rev. 1018, 1025, 1031, n. 73 (1956).

[fol. 57] be material in affecting a buyer's choice even though it does not relate to the product's quality or merits.[3]

The product may in fact be all that the purchaser thinks it to be; but if he has been induced to buy it by the sellers' fraud, injury is done both to the advertiser's competitors and to the public—which, through its representatives in Congress has established the fundamental principle of law that sellers in interstate commerce may not indulge in material untruths in their advertising.[4]

The original concept of the Commission's jurisdiction over false advertising, it may be noted, was limited to cases in which the advertising was found to be an unfair method of competition. See *FTC* v. *Raladam*, 283 U.S. 643 (1931); Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising*, 31 Colum. L. Rev. 527 (1931). While the Wheeler-Lea amendments to the Federal Trade Commission Act[5] established injury to consumers as an independently sufficient ground for finding a violation of Section 5, the basic proposition that advertising which is unfair to competitors violates the law has never been challenged.[6] If, relying on falsehoods told

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[3] Among the cases illustrating this principle are those [illegible] false disparagement of a competitor's reputation, methods, [illegible] ucts, e.g., *Steelco Stainless Steel, Inc.* v. *FTC*, 187 F. 2d 69[illegible] Cir. 1951); bait advertising, e.g., *Lifetime, Inc.*, Docket 7[illegible], December 1, 1961; deceptive pricing, e.g., *Niresk Industries, Inc.* v. *FTC*, 278 F. 2d 337 (7th Cir. 1960) cert. denied, 364 U. S. 883 (1960); dishonest testimonials, e.g., *FTC* v. *Standard Education Society*, 86 F. 2d 692 (2d Cir. 1936), modified, 302 U. S. 112 (1937); and misrepresentation of the seller's trade status, e.g., *FTC* v. *Royal Milling Co.*, 288 U. S. 212 (1932), *Deer* v. *FTC*, 152 F. 2d 65 (2d Cir. 1945).

[4] See note 2, *supra*; see *National Trade Publications Serv.* v. *FTC*, 300 F. 2d 790, 792 (8th Cir. 1962).

[5] 52 Stat. 111 (1938), as amended, 15 U. S. C. 545(a)(1) (1958).

[6] In the very first case arising under the Federal Trade Commission Act, *Sears, Roebuck & Co.* v. *FTC*, 258 Fed. 307, 311 (7th Cir. 1919), the court stated that the Commission is "not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the Government as parens patriae, are to exercise their com-

[fol. 58] them by a seller, consumers have been persuaded to buy his product, they may perhaps not be deceived or hurt in a strict pecuniary sense if the falsehoods did not relate to the quality or merits of the product. But such "deception" of purchasers is by no means essential to a finding of unfair competition. Regardless whether consumers are "injured" when they are induced to buy through false advertising claims, honest competitors are injured—because some or many of such sales have been made at their expense. And the Federal Trade Commission Act has enacted into law the fundamental concept that businessmen may not, in competing with each other for the consumer's dollar, resort to "unfair methods of competition in commerce and unfair * * * acts or practices in commerce." Even apart from any moral or ethical considerations, Congress considered that such methods and practices must be outlawed in a competitive system where sellers should have fair and equal access to markets and where success should be the reward of the most efficient rather than the least scrupulous.

The Commission reiterates the basic principle that unscrupulous sellers and advertisers may not make misrepresentations that are material in inducing purchases. It is not enough for sellers to refrain from misrepresenting the merits of their wares; the law prohibits them [fol. 59] from making any material misrepresentations designed to influence the public in choosing what, or what not, to buy.

What is essentially involved in this phase of the case is the question whether an advertiser may lie to prospective buyers to convince them that certain real qualities of a product actually exist. Consider, for example, an advertisement for a product that falsely claims to have the "Good Housekeeping Seal of Approval". Surely it would not be a defense that the product in fact meets all the

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mon sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases."

standards required for that seal. Cf. *Hearst Magazines, Inc.*, 32 F. T. C. 1440 (1941).

Other familiar examples of the same principle are faked "before" and "after" photographs and forged testimonials in advertisements for products that in fact possess the claimed quality or merits. A diet food may be effective as an aid in weight reduction, but that would not justify use of counterfeit photographic "proof" in advertising it. A brand of milk may be wholesome and nutritious, but parents may not be urged to buy it for their children on the false representation that the President's children drink it. A toothpaste may be beneficial in reducing the number of cavities, but if statistical proof is offered of its effectiveness in actual use by particular families or other groups, the proof must be genuine.

In short, if people are led by misrepresentations to buy an advertised product, in preference to an honest competitor's it is not sufficient justification to say that the product actually possesses the claimed quality or merits. Allowance of such a defense would place a premium on false, and a penalty on honest, advertising. To say that selling is an art does not mean that artifice must be tolerated. If it is too difficult or even impossible in a particular medium to present a truthful demonstration proving a claim made for a product, the seller may be obligated to forego use of the demonstration form of advertising in that medium. There may indeed be some advertising [fol. 60] claims that simply cannot be proved in a television pictorial demonstration. Nonetheless, as stated in our previous opinion, it would be a cynical subversion of the policy of the law to allow technical limitations of a particular medium to become lawful justification for resort to falsehoods and deception of the public.

The Commission recognizes that the task of convincing prospective customers of the various qualities of a product represents a challenge to every advertiser. An advertiser, promoting a product which he believes the public would benefit from buying, may feel—perhaps on the theory that the end justifies the means—that there is no harm in telling some "white lies" in order to induce consumers to buy it, so long as the product's merits are

not misstated. But if a seller may indulge in falsehoods in order to do a more successful job of advocacy, then his competitors who are truthful in their advertising are put at a disadvantage. It would be ironical indeed if businessmen who do not resort to material deceptions in advertising their products were forced, as a result of a decision of the governmental agency responsible for enforcing truth in advertising, to do so or suffer competitively. As the Court of Appeals for the First Circuit observed in a recent opinion, *Korber Hats, Inc.* v. *FTC*, decided December 31, 1962, Congress "gave the Commission a broad mandate to prevent public deception in the give and take of the market place", and the "[c]ourts have consistently upheld the Commission's efforts to compel manufacturers and retailers to adhere to a high level of honesty in connection with their labelling and advertising habits". "The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down." *FTC* v. *Algoma Lumber Company*, 291 U. S. 67, 79.

[fol. 61] IV.

We consider, finally, the questions of (1) the applicability of the "demonstration" part of the order to all products advertised by Colgate, and (2) the responsibility of Bates.

(1) The Commission here found two unfair competitive practices, not one. The record showed that respondents went beyond misrepresentation of the qualities or merits of a particular advertised product. They used an unfair and unlawful method of advertising: staging fraudulent visual demonstrations purporting to prove a quality claimed for a product, but which do not in fact constitute such proof because of the undisclosed substitution of a mock-up. The illegality and unfairness in here in the "spurious demonstration" *method* of advertising, and do not depend on the particular products advertised.

The Court of Appeals recognized, without deciding, that if a certain type of advertising demonstration is unlawful,

"it might be appropriate . . . to enter a broad order forbidding all such demonstrations en masse." We think that the entry here of such a broad order is not only appropriate but, in the circumstances presented, our duty to the public and honest competitors under the Federal Trade Commission Act. It would be less than adequate protection of consumers and competitors to enjoin the use of this unfair method of competition (*i.e.*, sham "demonstrations" that actually demonstrate or prove nothing) only insofar as it could be used in advertising one product, but not others. Respondents having been found to have engaged in that unlawful practice, the Commission was obliged to order them to stop it once and for all. If the function and purpose of a cease and desist order here are to halt respondents' unfair method of advertising, it would make no sense for the order to forbid them to stage spurious television demonstrations in advertising shaving [fol. 62] cream, but to allow them to contiue the practice in advertising toothpaste or soap.

In respect to the prohibition against misrepresentation of the quality or merits of products, our previous order was narrowly limited to Rapid Shave and other shaving creams. In view of our findings as to respondents' misrepresentations in that regard, as well as the fact that respondents are already subject to a number of outstanding orders and stipulations containing similar prohibitions with respect to other products,[7] the Commission would be

[7] In Docket 7737, June 1, 1960, Bates was ordered to cease and desisit from using, in connection with the advertising of oleomargarine, "any pictorial presentation or demonstration purporting to prove, or representing in any manner, that moisture drops appearing on said oleomargarine cause such oleomargarine to taste more like butter, or to be more similar in flavor, than competitive oleomargarine."

In Docket 7688, February 24, 1960, Bates was ordered to cease and desist from using, in connection with the sale of filter cigarettes "any pictorial presentation or demonstration purporting to prove that the filter . . . absorbs or retains more of the tars or nicotine in cigarette smoke than the filter used in other cigarettes [when such is not the fact] . . ." and from representing that any filter cigarette has the approval of any agency of the United States Government

[fol. 63] amply justified in extending the prohibition against such misrepresentations to all products similarly advertised by respondents.[4] However, since our earlier order, though perhaps overly generous to respondents, has in this regard been reviewed and sustained by the Court of Appeals, we will not disturb the limitation to Rapid Shave or other shaving creams.

(2) Whatever may be the rule in a hypothetical case where there is an absence of any knowledge or suspicion on an agent's part that an advertisement is false, it is clear that this is not that case. It was Bates that conceived the idea of television commercials making the claim, and "proving it with a "sandpaper test" demonstration, that Rapid Shave could shave sandpaper.[5] It was Bates that prepared and placed for broadcast on national net-

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or has been found by any such agency to be lower in tar or nicotine content than other filter cigarettes.

In Docket 7660, March 9, 1961, Colgate was ordered to cease and desist from representing, in connection with the sale of any dentifrice, "that said dentifrice affords the users thereof with complete protection against tooth decay . . . [or] misrepresenting in any manner the degree or extent of protection against tooth decay' . . . afforded users of any such dentifrice."

In Stipulation 8380, October 9, 1952, Colgate agreed to cease and desist from representing that "FAB washes clothes as clean without rinsing as with rinsing . . . [or that] . . . FAB without rinsing washes clothes cleaner than or as clean as soap with rinsing."

In Stipulation 2867, June 26, 1940, Colgate agreed to eliminate twelve representations concerning the qualities of Palmolive soap, two representations concerning the qualities of Cashmere Bouquet soap, five representations concerning the qualities of Super Suds, three representations concerning the qualities of shaving creams (including Rapid Shave), three representations concerning the qualities of dental cream, and one concerning the qualities of Kirkman Soap Flakes.

[4] See *Niresk Industries* v. *FTC*, 278 F. 2d 337, 343 (7th Cir.), cert. denied, 364 U. S. 883 (1960); *American Tack Co.* v. *FTC*, 211 F. 2d 239 (2d Cir. 1954); *Hershey Chocolate Corp.* v. *FTC*, 121 F. 2d 968, 971-72 (3d Cir. 1941).

[5] Proceedings before the hearing examiner, p. 85, testimony of Brantz M. Bryan, Jr., executive officer of respondent Bates. (Joint Consolidated Record Appendix, p. 65.)

work television, the commercials in question.[10] The record establishes that the responsible Bates officials knew that Rapid Shave could not shave sandpaper in the manner depicted and "proved" in the commercials. The record also establishes that it was this inability to shave sandpaper that led respondents to use a mock-up or artificial contrivance instead of real sandpaper in the visual "demonstration", wholly apart from any asserted technical photographic problems in reproducing sandpaper on the television screen.[11] While Colgate, as principal, is un- [fol. 64] questionably responsible for the advertisements broadcast on its behalf, it would be strange indeed if Bates, as the moving party in originating, preparing, and publishing the commercials, and having full knowledge not only that the claim was false but that the "proof" offered to the public to support it was a sham, should be relieved from responsibility.

On the facts of record, therefore, this is *not* a case of holding an agency responsible for advertising a false claim originated by its principal, where the agency was wholly without knowledge, or "any suspicion", of the falsity of the claim. So far as our order forbids Bates to disseminate spurious television commercial "demonstrations", the agency will necessarily know of the use of mock-ups in commercials which it itself prepares. And, so far as our order prohibits Bates from misrepresenting the qualities of Rapid Shave or other shaving creams, we shall include a specific provision allowing a defense where respondent shows that it neither had knowledge of the falsity of such a representation nor had any reason to question its truthfulness.

Pursuant to Section 4.22(c) of the Commission's Rules of Practice, respondents will have twenty days to file exceptions to any provisions of the proposed new order, or to

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[10] Answer to respondent Bates, p. 2. (Joint Consolidated Record Appendix, pp. 9-10.)

[11] Proceedings before the hearing examiner, p. 85, testimony of Mr. Bryan. (Joint Consolidated Record Appendix, p. 65.)

submit a proposed alternative form of order appropriate to carry out this decision.[12]

[fol. 65] Commissioners Anderson and Higginbotham concur in the result.

February 18, 1963.

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[12] To avoid any possible misunderstanding of its position, the Commission emphasizes that it proposed order here would not prohibit *per se* the use of a mock-up in television commercials, e.g. where it precisely depicts a substance or material that cannot accurately be reproduce on the television screen. As we recognize in Point II, *supra*, the limitations of television photography might in some circumstances permit use of such a mock-up. But it is one thing to use a mock-up merely as a substitute for an article whose image becomes distorted when photographed; it is something entirely different to use the mock-up in a "test" or "demonstration" of the advertised product's claimed qualities, and to represent it as being the genuine article.

Thus, even if it be assumed in the instant case that Rapid Shave can in fact shave sandpaper, precisely as shown in the commercials, and that a mock-up was used only because real sandpaper cannot faithfully be reproduced on television, it misses the point to say that the commercials were therefore free from falsehood. Respondents did more than merely use a mock-up. They made an affirmative representation that was false, namely, that they were presenting an actual test and giving actual proof of Rapid Shave's ability to shave real sandpaper, and that in the test real sandpaper was being used. The misrepresentation would not have been greater or more material, but only more explicit, if the announcer had stated: "this test is being made on real sandpaper, and not an artificial mock-up contrived to look like sandpaper." The point is, whatever the technical photographic reasons justifying use of a mock-up, there could be no justification for the false presentation to the public of "proof" that in fact was not proof.

[fol. 66]

BEFORE THE
FEDERAL TRADE COMMISSION

Docket No. 7736

IN THE MATTER OF
COLGATE-PALMOLIVE COMPANY, a corporation, and
TED BATES & COMPANY, INC., a corporation.

EXCEPTIONS AND STATEMENT OF RESPONDENT COLGATE-PALMOLIVE COMPANY TO PROPOSED FINAL ORDER.—filed April 15, 1963

This statement of exceptions and supporting reasons is filed by respondent Colgate-Palmolive Company ("Colgate") pursuant to the Commission's orders, issued February 18, 1963 and March 20, 1963.

This matter is on remand from the Court of Appeals for the First Circuit. The Court entered a decree on November 20, 1962 setting aside the Commission's first order and directing that further proceedings be in accordance with the Court's opinion filed that day. It is respectfully submitted that the Commission's second opinion and Proposed Final Order are improper for failure to conform to the Court's decree and for additional reasons hereinafter set forth.

[fol. 67]

I.

THE PROPOSED ORDER IMPROPERLY FAILS TO CONFORM TO THE MANDATE OF THE COURT.

It is fundamental that an agency must obey the rulings of a Court of Appeals. See *e.g.*, *Morand Bros. Beverage Co.* v. *NLRB*, 204 F. 2d 529, 532 (7th Cir. 1953), *cert denied*, 346 U. S. 909 (1953):

> "The pronouncements of the reviewing court are then known in the vernacular as 'the law of the case', *i.e.*, they are the rules to govern the particular dis-

pute at hand. In such a situation it behooves the inferior tribunal to exercise great care that the law of the case is applied to the facts of the case when they have been precisely determined by it. This is so even when it finds itself in well founded disagreement with its reviewer.

". . . In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them."

Moreover, Section 5(i) of the Federal Trade Commission Act provides that

"If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, . . . then the order of the Commission *rendered in accordance with the mandate of the court of appeals* shall become final on the expiration of thirty days from the time such order of the Commission was rendered. . . ."

[fol. 68] The Court of Appeals ruled that the use of a sandpaper mock-up by Colgate was not itself a material deception (310 F. 2d at 93-94), and that the Commission's order was permeated with a "fundamental error" in being based upon a finding of an illegal "method" or "practice" which the Court had "undercut" (*ibid.*). The Court, holding that "respondents' only offense was the making of a single misrepresentation about a single product", directed the Commission's attention to "the scope to be applied to single misrepresentations" (*id.* at 94-95).

The Commission did not seek a writ of certiorari, nor did it request reargument from the Court. Instead, it issued a second opinion and the Proposed Final Order herein excepted to. Colgate excepts to the Commission's failure to obey the Court. Colgate also excepts to the Commission's undertaking to "reconsider the entire case" as a device by which the Commission has done no more

than reargue its mock-up doctrine without permission of the Court of Appeals.

A. *The Commission's Views on Mock-Ups Were Squarely Overruled.*

In its initial opinion, the Commission had set forth its position on the use of a mock-up in this case as follows:

> "Assuming that there was no misrepresentation as to the effectiveness of 'Rapid Shave' in shaving sandpaper, was there nonetheless a misrepresentation in the visual demonstration offered as proof of such effectiveness? Specifically, was it deceptive to the public and an unfair advertising practice for respondents to conduct a 'sandpaper' test before the viewers' eyes to prove the product's 'super-moisturizing power' on what was represented as sandpaper, and what the viewers had every reason to suppose was sandpaper, but was actually a plexiglass mock-up?" (Joint App. 185).

[fol. 69] "The heart of these commercials was the visual 'sandpaper test'—a test that was, in reality, not taking place. This would be deceptive and unfair advertising even if 'Rapid Shave' was as effective in shaving sandpaper as respondents represented" (Joint App. 190-91).

> "The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not" (Joint App. 196).

The Court flatly overruled the Commission. It held:

> "We, of course, agree with the Commission that there is a misrepresentation of a sort, in any substitution case. But we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see, not by the means. . . .

> "[W]here the only untruth is that the substance [the viewer] sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it to be. There has been no material deceit" (310 F. 2d at 93-94).

It is submitted that it is not now open to the Commission in this proceeding to defy the Court and once more advance the contention that ". . . it is unlawful for advertisers to stage television commercial demonstrations that purport to—but do not in fact, because of the undisclosed [fol. 70] use of mock-ups or substitute materials—prove visually a quality or merit claimed for a product, regardless whether the product actually possesses such quality or merit" (Second Op., p. 5). The Commission was overruled precisely as to this fundamental legal conclusion: the newly-proposed order thus is "undercut" as basically as the order set aside by the Court.

Further exception is taken to the Commission's argument that it is not precluded by the Court's ruling because the Court misunderstood the Commission's views:

> "In setting aside the Commission's order, the Court of Appeals held that it was susceptible of being interpreted to prohibit indiscriminately the use of mock-ups or substitute materials in all television commercials in every conceivable hypothetical situation" (Second Op., p. 4).

We are unaware that the Court made such a holding. In any event, however, the Commission has overlooked a fundamental fact. Its first order and its proposed order prohibit the use of mock-ups (whatever the scope of the proscription) as a result of the Commission's underlying conclusion that the mere use of a sandpaper mock-up in this case was itself a violation of law (Joint App. 185, 190-91, 193). That conclusion as to the facts in this case was the basic issue before the Court when it considered

the mock-up question. The Court's opinion makes clear that it addressed itself to that issue:

> "In its opinion accompanying the order the Commission stated that one of the issues was whether, *even if the cream permitted the shaving of sandpaper precisely as pictured*, there was 'nonetheless a misrepresentation * * * and an unfair advertising practice'. The Commission resolved this issue by concluding that it was 'an illegal practice,' and was [fol. 71] likely to deceive the public and cause purchasers to buy what otherwise they would not have bought" (310 F. 2d at 93).

The Court thereupon squarely held the Commission's conclusion to be in error: that is one factor in this case as to which there is no ambiguity whatsoever. The Court fully understood and fully rejected the Commission's contention that the sandpaper mock-up used in this case was itself illegal—and the Court thereby undercut any present claim by the Commission that it may properly bar Colgate from the use of mock-ups if the scope of the prohibition is ostensibly narrowed.

B. *The Proposed Order Violates the Court's Decree.*

The Court held that "Respondents' only offense was the making of a single misrepresentation about a single product" and directed the Commission's attention to the proper scope or orders to be applied to single misrepresentations (310 F. 2d at 94).

The first paragraph of the proposed order is expressly based on a claimed illegal "practice"—"sham 'demonstrations'" (Second Op., p. 10). The proposed order thus openly violates the Court's ruling that no "practice" had been shown and the Court's direction that the order be shaped to a single misrepresentation about a single product.

The second paragraph of the proposed order is equally violative of the Court's decree.* Although the Commission

* So, too, is the preamble of the proposed order in referring to "methods", "acts" and "practices", directly contrary to the ruling of the Court.

states that the second paragraph of its initial order had been "reviewed and sustained by the Court of Appeals" (Second Op., p. 12), it points to nothing in the Court's opinion to justify such a conclusion. It is submitted, [fol. 72] rather, that the Court ruled to the exact contrary. Far from preserving that paragraph, the Court expressly stated that "we think it best that an *entirely* new one [order] be prepared" (310 F. 2d at 94).

The Court emphasized that the only appropriate order would be one directed toward a single misrepresentation of a single product. Despite this, the Commission's second opinion states that the second paragraph of its proposed order is drafted "in view of our findings as to respondents' *misrepresentations*" in regard to the quality or merits of products (Second Op., p. 11); the Commission thus admits that the paragraph is aimed at more than a single misrepresentation of a single product—and thereby openly defies the Court.

The Court, moreover, specifically referred the Commission to the Commission's own action in the *Gardol* matter (Docket No. 7660) (310 F. 2d at 95). The *Gardol* order was addressed to the degree or extent of protection against tooth decay or cavity development, the claimed misrepresentation having involved a matter within that specific area. If a comparable order in this case were to be extended beyond the exact parallel of the moisturizing effect of Palmolive Rapid Shave on sandpaper and other nonhuman substances, it would also embrace, at most, the moisturizing properties of Palmolive Rapid Shave on the human beard—not the sweeping prohibition proposed by the Commission.

It is submitted that the second paragraph, like the first, results from the Commission's rigid doctrine that—regardless of the decree of the Court of Appeals—Colgate violated the law in its use of the sandpaper mock-up. It is submitted, further, that the Court of Appeals foreclosed the Commission from applying that doctrine to the respondents in this case.

[fol. 73] Colgate must therefore except to the Commission's failure to obey the Court of Appeals—and specifically to the preamble and each paragraph of the proposed order.

II.

Proposed Alternative Order.

Colgate proposes an alternative form of order. It is submitted that its proposed order would be the order entered by the Commission if the Commission gave effect to the direction of the Court of Appeals. Incidentally, it also conforms to the Commission's own precedents.

A. *Breadth of the Order.*

The Court of Appeals directed that the order be framed in the light of the usual standard to be applied where there has been a single misrepresentation of a single product. It is therefore submitted that the order should be limited to Palmolive Rapid Shave or any other aerosol shaving cream having substantially the same composition.

As so limited to type of product, the order should cover the single quality or property of the product which was allegedly misrepresented.* Technically, the order could justifiably be limited to the extent of Rapid Shave's moisturizing effect on sandpaper or other non-human substances. We propose, however, to reduce the area of controversy and thus proscribe a category of misrepresentation rather than the precise violation found. Accordingly, [fol. 74] Colgate's proposed order embraces representations concerning the effectiveness of Rapid Shave's moisturizing properties on any substance, including the human beard.

The Commission has instead embraced all products of respondent in its proposed first paragraph and all misrepresentations in its second for the reason, already noted,

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* See, for example, the statement made by Commissioner Elman in *Quaker Oats Co.*, Docket 8119, CCH Trade Reg. Rep. ¶ 15858 (April 25, 1962) that the Commission "tailors the order to the particular type of misrepresentation found."

It may be noted that each paragraph of the order proposed by the Commission improperly fails to confine itself to moisturizing properties, the only category of misrepresentation involved in this case.

that the Commission refuses to obey the Court of Appeals in its ruling on the sandpaper mock-up.

Even if the mock-up question were not now a closed issue, the Commission's proposed order would still be indefensible.

1. In the first place, the Commission—despite its stated intention—has offered nothing new in support of its mock-up doctrine. Colgate therefore respectfully refers to its briefs before the Court of Appeals as the basis for its exceptions to each one of the Commission's arguments made in its second opinion in attempted justification of its recalcitrance* (pp. 12-13, 25-28 of Colgate's initial brief and pp. 4-5, 11-14 of its reply brief).

2. In the second place, the Commission has displayed a remarkable unwillingness to shape an appropriate remedy to the facts—whether or not the Court of Appeals had rejected the mock-up doctrine and directed the entry of a narrowly-confined order. The Commission has ignored a number of considerations which dictate a narrow order:

(a) Colgate's commercials made outright claims about the excellent moisturizing properties of Palmolive Rapid Shave for use in shaving on the human beard—the use for which the product is purchased. These claims have never been questioned by the Commission at any stage of this proceeding.

[fol. 75] (b) The mock-up doctrine of the Commission was unprecedented and contradicted previously-announced Commission policy (See Colgate's initial brief to the Court of Appeals at p. 26 and its reply brief at pp. 12-13).

(c) Other than the mock-up doctrine, the Commission could find a violation of the Act only by making findings as to issues which it had ruled on the motion to amend to be "additional or collateral"—findings which spelled out at most an exaggeration of the coarseness of sandpaper and the interval after application of Palmolive Rapid Shave to sandpaper; the violation thus found was one of degree and had nothing to do, in any event, with the qualities of Palmolive Rapid Shave in actual use for shaving of the human beard.

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* The statement by the Commission as to what the record "establishes" (p. 13) is excepted to as unsupported by the record.

(d) The complaint had been dismissed by an experienced Hearing Examiner after hearing.

(e) Colgate had discontinued the use of the contested commercials after receipt of the complaint.

(f) Any order of the Commission involves a penalty of up to $5,000 a day for each violation. An advertiser subjected to a very broad order, at a time when its competitors were not, would be operating under a genuine handicap if the order were not sufficiently precise to make possible a confident prediction of its meaning and if it forbade behavior which a respondent's competitors were free to undertake.

These considerations demonstrate that the Commission should have reached the same result decreed by the Court of Appeals without the need for such decree.

B. *Clarity of the Order.*

Colgate's proposed order conforms to the standard laid down by the Court of Appeals and is relatively clear and precise—at least insofar as it is humanly possible [fol. 76] to draft language in this area of the law which permits reasonable prediction of its scope and meaning. (See *FTC* v. *Henry Broch & Co.*, 368 U. S. 360, 367-68 (1962).)

In contrast, the Commission's proposed order not only defies the Court of Appeals but is improperly vague and ambiguous. The meaning of "test or demonstration" in the Commission's proposed first paragraph is wholly unclear. Nowhere does the opinion attempt to spell out the content of these words, except as there are hints that they are to be given broad application; for example, at pages 4 and 5 of its second opinion, the Commission refers to the iced tea example in a manner indicating that if the appearance of the liquid were anything but incidental to the commercial, the order might be violated even though a formal test or demonstration were not being conducted. By the same token, in the footnote at page 5 the opinion refers to ice cream and beer "head" mock-ups in other than incidental use as violating its mock-up doctrine. (The Commission apparently found other examples used by the Court, *i.e.*, the appearance of rich cream and a physical reproduction of an endorsement, as too difficult of exege-

sis.) It is submitted that a respondent advertising on the brink of penalties of $5,000 a day is entitled to guidelines which are a good deal more clear. (See *FTC* v. *Henry Broch & Co., supra.*)

The ambiguity is not inherent merely in the definition of a test or demonstration. It also carries over to other portions of the first paragraph which refer to "actual proof" of a claim made for a product. The difficulty here is that the Commission's second opinion seems to indicate that a representation may be made by implication. This appears to be the tenor of the second paragraph of the Commission's footnote 12 at page 14 of its opinion. It also is indicated by the Commission's discussion of the iced tea example: it is not at all clear from that discussion when the "appearance" of the liquid would be considered an [fol. 77] incidental aspect of the commercial, nor does the opinion spell out the manner in which the Commission would treat an argument that in smacking his lips the actor drinking colored water could be alleged to be representing and proving that Lipsom's Tea had excellent flavor.

The second paragraph of the proposed order is ambiguous and vague for other reasons. It prohibits the claiming of "qualities or merits that the product does not in fact possess"—a prohibition which is merely a paraphrase of the second paragraph of the order initially proposed by the Commission which had used the language "misrepresenting in any manner the quality or merits" of a product. As to the latter standard, when applied to a range of products, the Commission found in its initial opinion:

> "So broad and indefinite a command would be most difficult to obey, even in the best of faith. . . ." (Joint App. 204-05).

It is submitted that such a "command" becomes no less indefinite when it is confined to a type of product.

C. *Material Representations.*

The order should be limited to representations material to the inducement of a sale, a standard which the Commission's opinion recognizes to be valid and necessary (Second Op., pp. 4, 6, 7).

D. *Method of Representation.*

Colgate was found to have made its misrepresentation by only one means, that is, by a visual experiment on television employing a mock-up. Colgate does not ask, however, that the order be limited to the particular method of representation charged and found. It proposes that the order's coverage include relevant representations by any visual experiment whether or not on television and whether or not employing a mock-up.

[fol. 78] PROPOSED ORDER:

"It is

"ORDERED that respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of 'Palmolive Rapid Shave' or any other aerosol shaving cream having substantially the same composition, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

"Misrepresenting, in any respect material to inducing the sale of any such product, the moisturizing qualities of that product through visual presentation of any experiment or test with the product, either alone or accompanied by oral or written statements, when the product does not have the moisturizing qualities so represented."

Respectfully submitted,

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Of Counsel:

ARTHUR MERMIN,
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April 15, 1963.

[fol. 79] • • • •

BEFORE

FEDERAL TRADE COMMISSION

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and TED BATES & COMPANY, INC., a corporation.

EXCEPTIONS OF RESPONDENT TED BATES & COMPANY, INC., TO PROPOSED FINAL ORDER, STATEMENT OF REASONS IN SUPPORT OF EXCEPTIONS AND PROPOSED ATERNATIVE FORM OF ORDER IN ACCORDANCE WITH THE MANDATE OF THE COURT OF APPEALS.—Filed April 15, 1963.

As authorized by the Commission's procedural order directing the filing of exceptions to the Proposed Final Order, and pursuant to Section 5(i) of the Federal Trade Commission Act, 15 U. S. C. § 45(i),* respondent Ted [fol. 80] Bates & Company, Inc. submits its exceptions to the proposed order, a statement of reasons in support of its exceptions, and a proposed alternative form of order in accordance with the opinion and mandate of the Court of Appeals, entered on November 20, 1962 (see 310 F. 2d 89).

I. Introductory Comment.

This administrative proceeding is in a unique posture. The Commission's Proposed Final Order and accompany-

* Section 5(i) reads:

"If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected."

ing opinion make it clear that henceforth the dominant issue in this case will be the Commission's patent and defiant refusal to obey the mandate and rulings of the Court of Appeals for the First Circuit.

That Court's judicial review of the Commission's original decision fully and finally disposed of all substantive legal and factual issues in this case. The Court first sustained the Commission's ruling that the single product here involved did not have the moisturizing quality claimed in the challenged television advertising, that the claim was "material," and that the advertising therefore violated Section 5 of the Federal Trade Commission Act (310 F. 2d 89 at 91-92).

The Court explicitly proceeded, as was necessary, also to reverse the Commission's determination that television advertising which makes a truthful claim for a product in a test or experiment nevertheless violates Section 5 merely because the test or experiment shown on television used a mock-up or prop instead of the product, or instead of the substance represented as being used to test the product (*id.* at pp. 93-94).

Finally, the Court ruled that any order the Commission might enter on remand could treat only the single advertising representation found to be unlawful (p. 94); and that as to respondent Bates, the order must include a provision conditioning future liability for violation upon Bates' knowledge as to the falsity of the advertisement (p. 94).

[fol. 81] These rulings of the Court were fully apparent from its judgment. Embodied in a clear mandate at the close of its opinion, that judgment reads (p. 95):

> "*Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion*". (Emphasis in original opinion.)*

The contrast in the reactions of the respondents and of the Commission to the mandate and the rulings of the Court is striking. Respondents accepted the first ruling, as to which the Commission had prevailed. But the Com-

* The Court entered a decree in the same terms.

mission, while not timely requesting further judicial review, as it might appropriately have done, now belatedly proposes to reject essentially all the rulings of the Court that were adverse to it. Even though the Commission is under a statutory duty to follow the decision and mandate of the Court in this case, its rejection is boldly voiced as a sharp challenge to the Court as well as to the respondents. It is stated, *first*, in a Proposed Final Order which embodies the same broad product coverages and in substance the same sweeping prohibitions against mock-ups as those which the Court pointedly refused to sustain, and, *second*, in an "opinion on remand" which reargues the Commission's legal theory as to the meaning of Section 5 that the Court considered and squarely rejected in this proceeding.**

[fol. 82] Respondent Bates believes that its acceptance of the Commission's proposed new order would mean surrender of its basic rights under Section 5 of the Act that the Court of Appeals found in its favor; and, further, that acceptance of the proposed new order would destroy the integrity of the Court's decision which is the law of the case in this proceeding.

We are compelled therefore vigorously to protest the Commission's Proposed Final Order which is plainly and patently at odds with the mandate and the rulings of the Court. We are compelled further to oppose the attempt of the Commission to reargue its legal position in its new opinion. That reargument is wholly unwarranted in law, is repetitious of the Commission's prior opinion, and serves no lawful purpose at this juncture—when the only issue properly before the Commission is the formulation of an appropriate order in accordance with the mandate of the Court. See Section 5(i), Federal Trade Commission Act, 15 U. S. C. § 45(i).

** The statement in the Commission's opinion (p. 2) that it "has undertaken to reconsider the entire case" can mean no more than that, in purporting "to formulate a new order in the light of the various suggestions contained in the opinion of the Court," it is in reality attempting to reargue to the Court its views on the use of mock-ups to present a truthful product claim. That point was considered and decided by the Court. The Commission did not petition for rehearing. Compare Carr v. Federal Trade Commission, 302 F. 2d 688, 691-93 (1st Cir. 1962).

Respondent therefore respectfully urges that the Commission reconsider its proposal and formulate a new order in light of the specific rulings of the Court of Appeals and in accordance with its mandate as required by law.*

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* Both fairness and efficiency in the administration of justice require that the decision and mandate of an appellate court control the further proceedings by a lower tribunal to which a case is returned. The Supreme Court expressed this axiom of judicial procedure as early as 1838 in language that permits no misunderstanding:

> "Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. . . . [A]nd on a subsequent appeal, nothing is brought up but the proceedings subsequent to the mandate." Sibbald v. United States, 12 Pet. (37 U. S.) 488, 492.

The rule has remained unchanged through the years. *E.g.*, United States v. Haley, 371 U. S. 18 (1962); In re Potts, 166 U. S. 263 (1897); In re Sanford Fork & Tool Co., 160 U. S. 247 (1895).

Beyond challenge, the rule is as controlling of the action by a district court or by an administrative agency that has been directed to proceed on remand in accordance with the mandate and ruling of a federal court of appeals in the same case. *E.g.*, Lewis, Roca, Scoville & Beauchamp v. Christenson, 263 F. 2d 536 (10th Cir. 1959); Morand Bros. Bev. Co. v. National Labor Relations Board, 204 F. 2d 529 (7th Cir. 1953); *cf.* Romm v. Commissioner of Internal Revenue, 255 F. 2d 698 (4th Cir. 1958). In the Morand Bros. case, *supra*, the Court of Appeals for the Seventh Circuit took the Labor Board to task for its opinion on remand criticizing the court's view of the law; the court stated:

> "The pronouncements of the reviewing court . . . are the rules to govern the particular dispute at hand, unless, of course, the decision of the reviewing court is declared erroneous by a tribunal of competent jurisdiction holding a still more superior position in the judicial pyramid. . . .
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> . . . In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them." 204 F. 2d 532.

[fol. 83]

II. Exceptions to Proposed Final Order and Statement of Supporting Reasons.

Respondent's specific exceptions to the Commission's order directed against it, and its reasons why the order is not in accordance with the Court's mandate, may conveniently be stated separately as to each of the two numbered paragraphs of the proposed new order.

Paragraph 1.

A. *Use of Mock-ups or Props in Television Advertising Tests or Experiments.* It is obvious that the Commission has rewritten paragraph 1 of its old order in a purported attempt to dispel what were inescapable ambiguities and inconsistencies. But it is equally obvious that the Com- [fol. 84] mission lacks authority in this case to enter any order—however phrased—that prohibits television advertising of a product by a test or experiment merely because the advertising uses mock-ups or props, and not the product itself or other substances shown.

If the decision of the Court of Appeals is to have any meaning at all, it must mean that much. Moreover, we suggest that the Commission has failed even to accomplish its stated purpose. Although now grammatical and employing different and seemingly meaningful words, the new paragraph in fact compounds the ambiguities of the prior order, particularly when it is read together with the Commission's further explanatory opinion.

For these reasons, respondent Bates excepts to the entire paragraph 1 of the Commission's Proposed Final Order.

1. Respondent Bates believes that the sole issue properly before the Commission is, as already stated, the entry of an order in accordance with the mandate of the Court of Appeals. We do not, therefore, treat at length the Court's decision as to the lawfulness of the use of mock-ups in television advertising. Suffice it to say that there is no warrant for the Commission's attempt to reargue the merits of this issue, which it lost, by urging that the Court

of Appeals may not have fully understood the Commission's legal position.

The Court's opinion makes crystal clear that it did fully understand. Although recognizing that the use of a mock-up involves "a misrepresentation, of a sort," the Court held that viewers were not "misled in any material particular" by the use of mock-ups (310 F. 2d at 93). The Court later again declared that "where the only untruth is that the substance [the consumer] sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured" (*id.* at p. 94), and there is accordingly no viola- [fol. 85] tion of law. Throughout, moreover, the Court addressed itself precisely to the issue phrased in the Commission's prior opinion and to the prohibitions against mock-ups contained in paragraph 1 of its prior order:

> ". . . [W]hether mock-ups or simulated props may lawfully be used in television commercials to demonstrate qualities claimed for products, where the audience is told that it is seeing one thing being demonstrated while actually it is seeing something different." (Prior opinion of the Commission, Tr. 194; see 310 F.2d at 93, n. 6.)

Clearly, therefore, wholly apart from questions of language, paragraph 1 of the Commission's order cannot stand. In the Court's own words, its decision had "undercut the basis for any such order" (310 F. 2d at 94).

2. The Commission's new proposal is on no better footing as an attempt to phrase a paragraph 1 that would both control the use of mock-ups and speak in clear and understandable terms to a respondent who is faced with the ever-present danger of substantial penalties for violating a Commission order. The Commission's lengthy explanations of its new proposed paragraph 1 apparently were thought necessary to an understanding of its terms, but in fact they provide little real assistance.

The Commission first writes a gloss on the words "actual proof" by defining "fictional dramatizations" out of paragraph 1 (Opinion, p. 3). Television advertising that makes a truthful claim as to a product's qualities, the

Commission appears to be saying, could lawfully use mock-ups so long as the advertising comes within this newly suggested permissible area, which is now for the first time offered but yet remains unclarified by the Commission.

It would appear, from what the Commission has said, that its new paragraph 1 permits the use of mock-ups at least in televised "animated" tests or experiments, which [fol. 86] typically employ drawings or sketches rather than real actors or real products or other actual substances. The Commission, however, does not indicate why such dramatizations would be any less convincing to the viewer than other tests or experiments shown on television.*

Elsewhere in its opinion the Commission contradicts itself almost in the same breath in further interpretations of its proposed new paragraph 1. It envisages, for example, a clear line between "casual or incidental displays" of a product in commercials and what it believes to be advertising claims that are essential to selling the product. The Commission suggests that a television commercial may permissibly show an actor who states that he "loves Lipsom's tea," and that the commercial may lawfully use colored water instead of tea so long as the actor

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* The irrationality of the distinction the Commission advances may be illustrated by a hypothetical commercial. An advertiser might attempt to persuade consumers to buy nylon rope or cord, instead of a product composed of some other fibers, by claiming that nylon has greater tensible strength. That claim in fact is true. The commercial might show that heavy nylon ropes, tested by break-strength machines, sustain a far greater load without breaking than comparable ropes made of the other fibers. Yet, to assure that the test shown is safely conducted, or perhaps because the testing machines needed are too heavy or too bulky for a television studio, mock-ups are used.

Can it make any conceivable difference to a television viewer if the test is represented in animated form or as a test in real life? More fundamentally, can it make any conceivable difference to the viewer, that mock-ups are used if the nylon rope in fact performs as the commercial represents? To both questions, we answer that it cannot. Even if the use of mock-ups were open under the Court's mandate in this case, we submit that these fundamental inquiries, which arise again and again to plague one's common sense when any rational attempt is made to apply the Commission's order, have never been and are not answered satisfactorily by the Commission.

does not mention the liquid's fine appearance (Opinion, p. 4). Or, the Commission says, mock-ups may be used to show ice cream and the "head" of beer if no attempt is made to sell the product by proof of its "fine appearance" (*id.* at p. 5, n. 1).

[fol. 87] The Commission's distinctions, we respectfully suggest, are illusory, imaginary, and unreasonable as a directive for future conduct by a respondent subject to cumulative civil penalties. Television advertising sells a product in an endless number of contexts by displaying it in a way that is attractive to the viewer. However the Commission may attempt to explicate the language of the new paragraph 1, its crippling impact upon this dominant aim of all advertising of a product cannot be rectified. One who uses television to sell beer or ice cream—or anything—generally does so by pointing to the product's "fine appearance" or other attractive qualities. This simple act will frequently require the use of mock-ups; yet it is precisely what the Commission's order would proscribe. The Commission, in short, would bar all advertisers and advertising agencies from using mock-ups in the key situations in which they are most required by television as a communications medium.*

In the last analysis, these harsh realities are bluntly recognized by the Commission itself. Its new opinion (p. 9) echoes its broad earlier pronouncement (Tr. 195) that if mock-ups must be used even to make a truthful claim for a product, "the seller may be obliged to forego use of the dramatization form of advertising" on television. This stark conclusion is reached, however, without there having been any showing by the Commission of an

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* That this is the sweep of paragraph 1 is also suggested by the Commission's Parthian footnote (Opinion, p. 14, n. 12). The Commission there first states that its proposed new order would permit use of a mock-up "where it precisely depicts a substance or material that cannot accurately be reproduced on the television screen." But this gloss—on what the order itself does not provide—is further elaborated. The Commission next declares that even such a mock-up may not be used "in a 'test' or 'demonstration' of the advertised product's claimed qualities, and to represent it as being the genuine article." These remarks by the Commission abundantly confirm the inherent ambiguities in paragraph 1.

[fol. 88] "equivalent need" for such a "drastic remedy." See 310 F. 2d at p. 94, n. 8. Even if the issue were still open under the Court's ruling in this proceeding, certainly the record does not justify an order which would—as paragraph 1 does—effectively bar television mock-ups altogether when they are used to make truthful product claims by means of tests or experiments. As the Court of Appeals stated in expressing its rejection of the Commission's view of the law (310 F. 2d at 94, n. 9): "It is difficult to think the Commission [has] fully appreciated the principle it has espoused."*

B. *Product Coverage.* The Court of Appeals explicitly directed the Commission to apply only to the type of product involved in this case whatever substantive prohibitions against false and misleading advertising the Commission's order might properly contain. The ruling of the Commission that was upheld, the Court stated, involved only a finding as to a "single misrepresentation about a single product" and the Commission is "well aware of the scope [of an order] to be applied to single misrepresentations . . ." (310 F. 2d at 94). See also *Korber Hats, Inc.* v. *Federal Trade Commission*, 311 F. 2d 358, 363-64 (1st Cir. 1962). The Commission's order, we submit, may therefore reach only the specific product here involved or any other aerosol shaving cream having substantially the same composition.

The Commission's arguments to sustain an order reaching "any products," as the order applies to mock-ups or props, are both unpersuasive and wholly inaccurate.

[fol. 89] 1. The Commission first states (Opinion, p. 10) that the use of a mock-up in the challenged television advertisements constituted one of two "unfair competive

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* For example, as we inquired in the Court of Appeals, we inquire again of the Commission now: Must respondent "henceforth actually and repetively use produets such as depilatories, first-aid preparations and sunburn remedies, and employ actors who in fact currently need the application of such products, when it undertakes to prepare advertisements that will sell their qualities or merits? Must one, for example, lacerate an actor before demonstrating the application of a Band-Aid?" Reply Brief for Petitioner Ted Bates & Company, Inc., p. 16.

practices" and involved an "unlawful *method* of advertising" (emphasis added). The Court of Appeals, however, pointedly declared that because the use of mock-ups was not unlawful under Section 5, in this case or otherwise, the Commission had made "no showing of any single 'method' or 'practice' in the sense discussed by the Commission in its opinion" (310 F. 2d at 94). To the extent, therefore, that the Commission now relies upon having found an unlawful "method" or "practice" to buttress an order with broad product coverage, it is in square conflict with the decision of the Court of Appeals.*

2. Nor can the Commission sustain its proposed broad product coverage with a partial and inaccurate quotation (Opinion, p. 10) from the decision of the Court of Appeals. Instead, the Court's language requires rejection of the unlimited product coverage the Commission would order.

The Court stated that had it ruled differently—had it ruled mock-ups to be "illegal per se" under Section 5—then a broad order forbidding "en masse" all use of mock-ups in demonstrations "might be appropriate." But the Court did not so rule; indeed, when it made the statement it had already expressly reversed the Commission on the controlling question of substantive law (310 F. 2d at 93-94).

The Commission's opinion, however, now inaccurately rephrases the Court's careful statement to read that "*if* a certain type of advertising demonstration is unlawful, 'it might be appropriate . . . to enter a broad order forbid-[fol. 90] ding all such demonstrations en masse'" (Opinion, p. 10; emphasis added). It then cites its own reformulation of what the Court said in an effort to support a new order with broad product coverage. The Commission's unwarranted reliance upon the word "if" is thus laid bare. Obviously, the key assumption underlying the

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* The refusal of the Court to find an unlawful "method" or "practice" and the Court's statement that the "only offense was the making of a single misrepresentation about a single product" also require deletion of the reference to "methods of competition or . . . practices" that appears in the preamble to the Commission's Proposed Final Order.

Commission's "if" is negatived by what the Court of Appeals held: The use of a mock-up was not illegal, per se or otherwise. That plain holding is the law of this case, and prohibits an order with the broad product coverage the Commission now proposes.

3. The Commission's proposed broad product coverage likewise conflicts with its own practice in advertising cases. Thus, in addition to *Colgate-Palmolive Co.*, Dkt. 7660, CCH Trade Reg. Rep. ¶ 29,445 (1961), which the Court of Appeals expressly relied upon, the Court could also have cited a list of recent cases that have fixed the Commission's far more narrow position on this matter. If the Commission is to fulfill its responsibility as an expert administrative agency, it has the duty to inform the respondents, and ultimately the Court, why it suddenly seeks to discard its established practices and to embrace in an advertising cease and desist order *all products* that the respondents might now or in the future advertise, or, as to an advertising agency, which that agency may in the future be employed to advertise for any principal. See, *e.g.*, *The Mennen Co.*, Dkt. 8146, CCH Trade Reg. Rep. ¶ 15,133 (May 4, 1961); *Evelyn Miller*, Dkt. 8398, CCH Trade Reg. Rep. ¶ 15,451 (September 22, 1961); *Approved Formulas, Inc.*, Dkt. 8151, CCH Trade Reg. Rep. ¶ 15,301 (July 18, 1961); *Aluminum Company of America*, Dkt. 7735, CCH Trade Reg. Rep. ¶ 29,436 (March 4, 1961); *Eversharp, Inc.* Dkt. 7811, CCH Trade Reg. Rep. ¶ 29,094 (September 20, 1960); and *Lanolin Plus, Inc.*, 54 F. T. C. 446 (1957).

4. The Commission also seeks to support a broad product coverage by referring to prior consent orders involving [fol. 91] each respondent alone, and to one litigated order involving respondent Colgate alone (Opinion, pp. 11-12). It needs no elaborate argument to establish that what was previously determined as to one respondent, in a wholly different case to which another person was not a party, cannot lawfully be used to fashion an order against that person as a respondent in a later case.

Moreover, respondent Bates has already objected to the Commission's improper reliance, in violation of its own rules, upon prior consent orders to broaden the scope

of an order in any subsequent case.* The Commission's reference to those prior proceedings was to no avail in the Court of Appeals, and it cannot assist the Commission now. We repeat: Consent orders explicitly state that the agreement "is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint". See Rules of Practice, § 3.3. The Commission's continued Andabatarian reliance on prior consent proceedings is therefore wholly misplaced; they do not support the entry of any order at all—much less an order with broad product coverage.

5. Lastly, the Court's decision specifically controls the scope of the Commission's order on another question that is related to product coverage. As to respondent Bates, the Court suggested that the Commission's prior order was improperly broad because its prohibitions were applicable "with regard to every customer" whom Bates might now or in the future serve as an advertising agency (310 F. 2d at 94). In light of the limited violation of Section 5 found by the Court, the Commission's order as to Bates must be narrowed to covered products "made, sold and advertised by respondent Colgate-Palmolive Company."

[fol. 92] PARAGRAPH 2.

Two preliminary comments must precede the statement of respondent Bates' specific exceptions to paragraph 2 of the Proposed Final Order.

First, respondent disputes the Commission's conclusion that the Court sustained the comparable paragraph of the prior order "apparently in all respects" (Opinion, p. 2). The mandate of the Court of Appeals stated: "Judgment will be entered setting aside the order of the Commission" (310 F. 2d at 95). The Court did *not* enter a judgment "setting aside paragraph 1 of the order of the Commission and affirming paragraph 2."

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* Brief of Petitioner Ted Bates & Company, Inc., in the Court of Appeals, p. 26, n.*.

Second, respondent contends that the Commission's proposed paragraph 2 is, with the necessary modifications described below, the entire order that may be lawfully entered by the Commission in this case if the mandate and rulings of the Court are to be respected as required by the statute.

We turn now to our specific exceptions to paragraph 2. Thereafter, in the final portion of this memorandum, we set forth, as a revised paragraph 2 together with an appropriate preamble, a proper form of order to be entered by the Commission that would be in accordance with the Court's mandate and as required by Section 5(i) of the Act.

A. *Product Coverage.* For the reasons already stated in the consideration of paragraph 1 (pp. 16-18 above), paragraph 2 should be revised to embrace only "Palmolive Rapid-Shave" or any other aerosol shaving cream having substantially the same composition.

B. *Prohibited Representations—"Moisturizing Qualities."* Paragraph 2 should reach only representations as to the "moisturizing qualities" of the covered shaving cream products. The opinion of the Court, as already [fol. 93] noted, labelled the only offense properly found as involving "the making of a single representation about a single product" (310 F. 2d at 94). In describing that representation, the Court indicated that, in its judgment, it concerned solely the moisturizing qualities of the product (*id.* at pp. 90-92).

So limiting the scope of paragraph 2 would accord with the practice of the Commission in advertising cases. As Commissioner Elman has stated, dissenting in *Quaker Oats Co.*, Dkt. 8119, CCH Trade Reg. Rep. ¶ 15,858 (April 25, 1962):

> "When the Commission finds that a respondent has falsely advertised its product in a particular way—*e.g.*, as to foreign origin—it does not issue an order prohibiting all known forms of misrepresentation or misrepresentation in general. It tailors the order to the particular type of misrepresentation found."

See also cases cited at p. 17 above.

We note in passing that our objection to the Commission's failure to limit paragraph 2 to representations about "moisturizing qualities" applies with the same, if not greater, force to the Commission's open-ended paragraph 1 dealing with mock-ups. Should the Commission persist, in defiance of the mandate of the Court, in entering any order with prohibitions against the use of mock-ups, that part of the order must apply only to claims as to the "moisturizing qualities" of the covered products. Were the point open under the Court's mandate, paragraph 1, therefore, would on any theory and at the very least, have to be modified to include the words "as to moisturizing qualities" after the words "actual proof of a claim."

C. *Prohibited Representations—By "Visual Experiments or Tests."* Paragraph 2 must be limited to repre- [fol. 94] sentations as to the moisturizing qualities of the included shaving products by the presentation of visual experiments or tests with the product. The Court's opinion deals with a visual representation as to the quality of the product for use in shaving sandpaper. The Court discussed this quality in terms of what was "apparently shown" in the television test (310 F. 2d at 91); it referred to the characteristics of the sandpaper used in the "visual demonstration" (*ibid.*); and it repeatedly pointed to the effect of the representations on television viewers (*passim.*). The opinion's emphasis on these "visual" aspects of the misrepresentation charged requires that paragraph 2 be limited to the "visual presentation of tests or experiments."

D. *Prohibited Representations—"Materiality."* The prohibitions of paragraph 2 may lawfully apply only to representations that are material to inducing the sale of the covered products. Although the Commission's opinion repeatedly acknowledges that advertising representations must be "material" before they may be held unlawful (*e.g.*, pp. 4, 6, 7), the Commission has not included language of materiality anywhere in its Proposed Final Order. The Court of Appeals also recognized that representations that may be found to violate the law must be

limited to those that mislead in a "material particular" or which involve "material deceit" (310 F. 2d at 93, 94). Verbal obeisance by the Commission is not enough. Paragraph 2 should state that the prohibited representations as to moisturizing qualities must be only those that are material to inducing the sale of the porducts the order affects.

E. *The Knowledge Required of Respondent Bates.* Respondent Bates excepts to the manner in which the Commission has treated the Court's direction that the future responsibility of Bates, the advertising agency, for violation of the order must be conditioned upon the reasonableness of its knowledge—its scienter—as to the falsity of [fol. 95] the advertising. The Court directed the formulation of an order that would afford respondent a realistic and meaningful degree of protection, given its limited capacity as an advertising agency. The Commission's proposal does not do so.*

The relevant portion of the Commission's paragraph 2 reads:

> "unless respondent shows that it neither had knowledge of the falsity of such representation nor had any reason to question its truthfulness."

The Commission's formulation, we suggest, confuses and distorts what should be a simple matter.

In the first place, there is no warrant for making the scienter requirement a matter of defense to be raised and established by respondent in the future. It is the Commission itself which should be required, in any subsequent compliance proceeding, initially to adduce evidence that respondent had reason to know that the advertisement was false. The Commission will have that burden as to the other elements of the order, and we see no reason or

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* The Commission apparently seeks to minimize the importance of the scienter provision to an advertising agency. Its opinion states at length that in this case respondent knew that the advertisement was false (Opinion, pp. 12-13). We submit that these statements, assertedly based on a new and unsupported reading of the record with which respondent strenuously disagrees, misconceive the purpose of a cease and desist order. It is axiomatic that any Commission order operates only to regulate a respondent's business conduct prospectively.

legal basis for transferring the burden to respondent in any future penalty action.

The substantive standard of knowledge the Commission would require of respondent is also improper. No detailed discussion is needed to demonstrate the vagueness and the uncertain meaning of the word "question" in the Commis-[fol. 96] sion's phrase "reason to question." At the most, respondent should be held only to a standard of reasonable care, and that standard is best articulated and far better understood with the words "reason to know." Respondent accordingly urges that the scienter provision of the order read as follows:

> "when respondent knew or reasonably should have known that the product did not have the moisturizing qualities so represented." *

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* We have included the word "moisturizing" before the word "qualities" in keeping with our previously expressed position (p. 21 above) that the order may properly bar only representations as to "moisturizing qualities."

We must further note, *arguendo*, what will be another inadequacy of the Commission's treatment of the scienter issue if, in defiance of the decision of the Court, the Commission should persist in entering an order prohibiting the use of mock-ups. The Commission explained its failure to include a scienter provision in this portion of the Proposed Final Order on the ground that respondent "will necessarily know of the use of mock-ups in commercials which it itself prepares" (Opinion, p. 13).

This assumption, however, is unfounded in fact. It wholly overlooks business practices that are common place in preparing, producing and disseminating television commercials. Advertising agencies "prepare" a commercial only in the sense that they formulate it as a script or storyboard. The script or storyboard is then turned over to an independent television film-producing company which undertakes to "produce" the commercial on film or tape. Copies of this film or tape are thereafter distributed to television broadcasters who actually "disseminate" the commercial. Samples of the advertised product, or of other articles or substances to be used in producing the commercial, are often supplied by others, such as the independent film-producing company, or are purchased on the market. The film-producing company's producers, cameramen, prop men and other technicians also select the audio and video techniques that are necessary to produce a satisfactory film or tape for use on television.

To say that an advertising agency "will necessarily know of the use of mock-ups in commercials which it itself prepares" thus

[fol. 97]

III. Respondent's Proposed Alternative Form of Order.

Respondent Bates submits the following proposed alternative form of order. For the reasons set forth above, respondent believes that the order is in accordance with, and is plainly required by, the mandate of the Court of Appeals.

"It is Ordered that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in the advertising of 'Palmolive Rapid Shave' or any other aerosol shaving cream having substantially the same composition made, sold and advertised by respondent Colgate-Palmolive Company, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

[fol. 98] "Misrepresenting, in any respect material to inducing the sale of any such product, the moisturizing

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vastly and incorrectly oversimplifies a complicated technical process and tells very little of the whole story. Advertising agencies are no more equipped to undertake television film-producing than they are to perform the broadcast or dissemination process. The agency's job is to formulate the ideas and the script for the commercial, to recommend broadcast schedules and to check performance thereof by the broadcasters.

In these circumstances, the vagaries of application inherent in the Commission's new order—turning on such elusive notions as the exclusion of "fictional dramatizations" or "casual or incidental" displays of a product, yet including representations that deal with (or that may be "actual proof" of) the "longevity" or "fine appearance" of that product—certainly require that an advertising agency be taxed with responsibility only for what it knew or reasonably should have known.

Therefore, if the Commission's order should continue to prohibit the use of mock-ups, in defiance of the Court's mandate, a scienter clause such as the following must be included at the end of that part of the order:

> "when respondent knew or reasonably should have known that the material or article used in the test or experiment was a mock-up or substitute material or article."

qualities of that product through visual presentation of any experiment or test with the product, either alone or accompanied by oral or written statements, when respondent knew or reasonably should have known that the product did not have the moisturizing qualities so represented."

Respectfully submitted,

JOSEPH A. MCMANUS

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Counsel for Respondent
Ted Bates & Company, Inc.

Of Counsel:

COUDERT BROTHERS
COVINGTON & BURLING

April 15, 1963

[fol. 99] * * * *

BEFORE THE

FEDERAL TRADE COMMISSION

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and TED BATES & COMPANY, INC., a corporation

STATEMENT OF COMPLAINT COUNSEL IN REPLY TO RESPONDENTS' EXCEPTIONS TO PROPOSED FINAL ORDER, STATEMENT AND PROPOSED ALTERNATIVE FORM OF ORDER—Filed April 25, 1963.

Respondents herein argue that the Commission's Proposed Final Order is not in accord with the mandate of the Court of Appeals for the First Circuit when on review that court set aside the Commission's order and remanded this matter to the Commission for it to write a new order. Their argument that the Commission ignored the Court's mandate is indeed misplaced—it should be directed to the court of appeals.

By its opinion on remand, the Commission has made it quite clear that in its judgment it has acted in accordance with the Court's opinion.

In their self-serving analysis of the Court's opinion, the respondents have chosen to treat the Court's "two suggestions" as something more—as "directions" to the Commission, and, as evidenced by their Proposed Alternative Form Of Order, they have chosen to ignore the Court's [fol. 100] observation that the order it set aside was *not* erroneous in every particular.

The Court directed the Commission to write a "new" order, one that did not prohibit the use of "mock-ups" en masse, this the Commission has done.

The Commission having already expressed itself on the matter of compliance with the Court's opinion, we see no need to reply further to respondents' arguments on this question.

The Commission's Proposed Final Order is not in conflict with the Court's opinion, in fact its order is perhaps narrower than it need have been. It is obvious from the Court's opinion that any demonstration that attributes to a product qualities that it does not possess should not be permitted. The Commission has not gone this far. Paragraph One of its order prohibits false demonstrations *only* when they involve the use of "a mock-up or substitute material or article".

Respondents' Proposed Alternative Form of Order is so limited in scope and application that one has difficulty seeing how it can be said that the issuance of such an order would serve to protect the public interest. It will be noted that if respondents used the same "sandpaper" demonstration to allegedly prove the "moisturizing qualities" of shaving cream that is sold in a tube their proposed order would not be violated.

Respondents' Proposed Form of Order and their argument in support thereof amounts to a contention that they are entitled to falsely advertise not only each product that they sell or advertise, but also each individual characteristic or quality of each product. Were the Commission so restricted in the scope of its orders, the Federal Trade Commission Act would be a virtual nullity.

As complaint counsel we are cognizant of the fact that it is not within our province to propose an "Alternative Form of Order" to the Commission, and we do not pro- [fol. 101] pose to do so. We suggest however, that the Commission give consideration to changing the preamble to its Proposed Final Order. It will be noted that, as written, said order does not relate to the sale of any product in "commerce", it declares that a false advertisement in "commerce" is an unfair method of competition or an unfair or deceptive act or practice. It is not our purpose here to question or to support the sufficiency of such an order, but we do question the advisability of entering such an order herein at this stage of the instant proceedings. We feel that this would be injecting something entirely new into the proceedings at a most inappropriate time and for this reason the Commission might wish to reconsider this point. Respondents' Proposed Alternative

Form of Order covers this point in the manner we would propose.

Respectfully submitted,

EDWARD F. DOWNS,
ANTHONY J. KENNEDY, JR.,
Complaint Counsel.

[fol. 102] * * * *

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON,
Chairman

SIGURD ANDERSON
PHILIP ELMAN
EVERETTE MACINTYRE
A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and TED BATES & COMPANY, INC., a corporation.

THIRD AND FINAL ORDER AND MEMORANDUM of COMMISSION.—May 7, 1963

I.

IT IS ORDERED that respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which [fol. 103] is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop

instead of the product, article, or substance represented to be used therein.

II.

IT IS FURTHER ORDERED that respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Palmolive Rapid Shave" or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving.

III.

IT IS FURTHER ORDERED that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Unfairly or deceptively advertising any such product by presenting a test, experiment or demon-
[fol. 104] stration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein: provided, however, that it shall be a defense hereunder that respondent neither knew nor had reason to know that the product, article or substance used in the test, expirement or demonstration was a mock-up or prop.

IV.

IT IS FURTHER ORDERED that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Palmolive Rapid Shave" or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving: provided, however, that it shall be a defense hereunder that respondent neither knew nor had reason to know of the falsity of such representation.

V.

IT IS FURTHER ORDERED that each respondent shall, within sixty (60) days after service upon it of this order, file [fol. 105] with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Commissioner Anderson concurring in the result.

SEAL

s/ JOSEPH W. SHEA

JOSEPH W. SHEA,
Secretary.

Issued: May 7, 1963

[fol. 106] * * * *

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON,
Chairman

SIGURD ANDERSON
PHILIP ELMAN
EVERETTE MACINTYRE
A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and TED BATES & COMPANY, INC., a corporation.

MEMORANDUM ACCOMPANYING FINAL ORDER—
May 7, 1963

By the Commission:

On February 18, 1963, the Commission issued its opinion on remand and a proposed new cease and desist order. On April 15, 1963, each of the respondents filed exceptions to the proposed order, and an alternative form of order. Respondents would limit the order so that it would apply only to the advertising of Rapid Shave or other aerosol shaving creams; it would prohibit only misrepresentation of the "moisturizing qualities" of such shaving creams, and only where the misrepresentation is made in a "visual [fol. 107] presentation of any experiment or test with the product, * * * when the product does not have the moisturizing qualities so represented." Respondent Bates proposes further that its order should apply only when it "knew or reasonably should have known that the product did not have the moisturizing qualities so represented."

The function of a cease and desist order is to give solid assurance to the public and honest competitors that the

illegal and unfair practices found will not be resumed. Respondents' proposed order would do far too little in achieving that purpose. It would, at most, prevent respondents from repeating the precise misrepresentation of fact contained in the commercials which prompted the Commission to initiate this proceeding in January 1960. But the primary concern of Section 5 of the Federal Trade Commission Act, and cease and desist orders issued thereunder, is with "unfair *methods of competition*" and "unfair or deceptive * * * *practices* in commerce."

When, as in this case, the record shows not merely a misrepresentation of fact concerning a product offered for sale, but the pursuance of an unfair and illegal form of advertising, manifested by its repetition over a substantial period of time, an effective order must also be directed at the form of advertising (i.e., the "practice" or "method of competition") found illegal. Respondents did more than misrepresent the moisturizing properties of Rapid Shave; they adopted, and pursued, a method of advertising * which, because of the material falsehoods contained in such advertising, made it unfair to honest competitors and the public.

Respondents' proposed alternative form of order must, therefore, be rejected as ineffective and unrealistic. In the light of respondents' exceptions to the proposed final order, [fol. 108] the Commission has modified it in minor respects to make it more clear and specific; and as thus modified, the final order will be issued.

A word must be said about respondents' vigorous assertion that the Commission, since it did not file a petition for certiorari in the Supreme Court to review the decision of the Court of Appeals, is therefore barred from entering a new order at this time. In vacating our original order and remanding the case to the Commission for further proceedings because "we think it best that an entirely new one be prepared", 310 F. 2d at 94, the Court of Appeals expressed doubt and uncertainty as to the reach

* Presenting tests, demonstrations or experiments which are represented to the public to be actual proof of a material claim made for the product but which in fact are spurious and rigged, actually proving nothing.

and scope of the original order. It seemed to the Commission that, to a very considerable extent, these ambiguities were engendered by the extreme arguments made by counsel on both sides, in attacking as well as defending the order on appeal. In the circumstances, the most sensible, as well as the least dilatory, course for the Commission to follow was to proceed at once to remove those ambiguities, and to restate with clarity and precision the basis and breadth of our findings and order. This task, as the Supreme Court has frequently reminded the federal administrative agencies, is to be performed by the agency and not by its lawyers arguing on appeal. See, e.g., *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943). For only the agency can, and should, exercise the administrative judgment and discretion involved in the formulation of an order.

Respondents urge nonetheless that the Commission, as a condition precedent to the formulation of a new order, was obliged to invoke the appellate jurisdiction of the Supreme Court by the filing of a petition for certiorari. But one need not be an expert in such matters to know that, in the posture of the case after the Court of Appeals decision, the filing of a petition for certiorari would not only have been inappropriate but an unwarranted imposition on the Supreme Court, which has repeatedly ad- [fol. 109] monished against the filing of improvident petitions for certiorari. In light of the ambiguities found in our original decision and order by the Court of Appeals, the case was in no posture for Supreme Court review. Had such a petition been field, the Supreme Court undoubtedly would have considered that the Commission, not the Court, should undertake to remove those ambiguities—a task we have now performed without wasting the Court's and the public's time. Possibly the Commission has erred in its handling of this case, but it most assuredly has not failed in its duty of respect to the Supreme Court and the Court of Appeals.

Commissioner Anderson concurs in the result.

May 7, 1963.

[fol. 110] IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. .....

COLGATE-PALMOLIVE COMPANY, PETITIONER

against

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO CORRECT, REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.—filed June 6, 1963

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT:

Petitioner, Colgate-Palmolive Company, a corporation (hereinafter referred to as "Colgate" or "petitioner"), pursuant to the Federal Trade Commission Act (§§ 5(c) and (i), 38 Stat .719 (1914), as amended, 15 U. S. C. §§ 45(c) and (i) (1958)), the Administrative Procedure Act (§ 10(b), 60 Stat. 243, 5 U. S. C. § 1009 (b) (1952)) and Rule 16 of this Court, respectfully requests this Court to correct, review and set aside an order to cease and desist issued by the Federal Trade Commission in *In the Matter of Colgate-Palmolive Company, a corporation, and Ted Bates & Company, Inc., a corporation*, FTC Docket No. 7736, and as grounds therefor respectfully shows as follows:

[fol. 111]

I.

Basis of Venue.

1. This matter is before this Court for the second time. The instant petition is filed in this Court within 30 days after a "final order" dated May 7, 1963 was issued by the

Commission and received by petitioner by registered mail on May 17, 1963. Colgate is incorporated under the laws of the State of Delaware and carries on its business at offices and locations in this Circuit. It maintains a permanent sales office headed by a district sales manager in Boston, Massachusetts; has groups of employees permanently assigned to duties (which include the solicitation of customers) within the States of Massachusetts and Rhode Island; warehouses its products in said States; and has qualified to do business in said States. The advertising held by the Commission to be a violation of § 5(a) of the Federal Trade Commission Act was broadcast by telvision from stations in Boston, Massachusetts, and in other cities in this Circuit. The venue of this proceeding lies in this Court pursuant to § 5(c) of the Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. § 45(c) (1958).

II.

Nature of Proceedings.

2. The latest order of the Commission, like the one set aside by this Court, is based on a conclusion that Colgate and its advertising agency, Ted Bates & Company, Inc., had violated § 5(a)(1) of the Federal Trade Commission Act (38 Stat. 719 (1914), 15 U.S.C. § 45(a)(1) (1958)) by preparing and causing to be telecast in the fall of 1959 three commercials which the Commission deemed to be deceptive and misleading. Colgate and its subsidiaries are engaged in the worldwide manufacture and distribution of house hold detergents, toilet articles, [fol. 112] industrial products, ethical drugs, and other goods: the commercials here in issue advertised one of the products in Colgate's toilet-article line, the pressurized shaving lather which it markets as "Palmolive Rapid Shave." Throughout the proceedings herein the Commission condemned the techniques used in the three filmed television commercials to illustrate Palmolive Rapid Shave's capacity—which the Commission has at no time questioned—to wet or soak a human beard and, as a result, to provide desirable shaves. Each of the commercials portrayed the application of Palmolive Rapid Shave

to sandpaper. As the announcer stated "apply . . . soak . . . off with a stroke," the commercials depicted a hand holding a razor and shaving the sandpaper. The commercials also depicted the application of Palmolive Rapid Shave to a man's face, a man shaving his lather-coated beard and, again, a hand shaving sandpaper. The commercials used, in place of sandpaper, a "mock-up" consisting of a piece of transparent material coated with sand.

3. The first order of the Commission in this case (Exhibit A hereto) was set aside by this Court by decree and opinion dated November 20, 1962 (*Colgate-Palmolive Company* v. *Federal Trade Commission*, Nos. 5972 and 5986, 310 F. 2d 89 (1st Cir. 1962)) (Exhibit B hereto). The decree of this Court ordered, adjudged and decreed that further proceedings were to be in accordance with its opinion filed that day. The opinion of this Court held, *inter alia*, that the Commission committed "fundamental error" in finding the use of a mock-up to be illegal and that the only proper order was one appropriate to the making of a single misrepresentation about a single product, *i.e.*, the facility with which Palmolive Rapid Shave could shave sandpaper.

4. Thereafter, the Commission issued a second opinion and a proposed order under date of February 18, 1963 (two of the five Commissioners concurring in the result) (Exhibit C hereto). The second opinion asserted, *inter* [fol. 113] *alia*, that the use of a mock-up in this case was itself an independent violation of law and an illegal practice. The opinion also claimed that the second paragraph of the order to which this Court had earlier addressed itself had been reviewed and sustained by this Court without modification. The proposed final order embraced substantially the same activities and products of petitioner which the Commission sought to bar in its first order already set aside by this Court. In its second order, the Commission allowed petitioner 20 days after service of its proposed order to file with the Commission any exceptions (and supporting statement) to the proposed order and a proposed alternative form of order.

5. Petitioner's exceptions, statement, and proposed alternative form of order were filed with the Commission on April 15, 1963 (Exhibit D hereto). Complaint counsel filed a statement in reply to petitioner's exceptions received by petitioner by mail on April 29, 1963 (Exhibit E hereto). The third order of the Commission, accompanied by a memorandum, each dated May 7, 1963 (received by petitioner May 17, 1963) (Exhibit F hereto), seeks to embrace substantially the same activities and products as its earlier two orders; the memorandum concludes that the Commission "most assuredly has not failed in its duty of respect to the Supreme Court and the Court of Appeals." One Commissioner concurred in the result.

6. The Commission's third order was issued despite petitioner's demonstration in its exceptions filed with the Commission that this Court had ruled as a matter of law (1) that the use of a mock-up in this case was not illegal and that (2) petitioner's "only offense was the making of a single misrepresentation about a single product" and the Commission was "well aware of the scope to be applied to single misrepresentations." The Commission's third order seeks to bar Colgate from:

> "Unfairly or deceptively advertising any [of the products sold by it] by presenting a test, experiment [fol. 114] or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein."

and, with respect to any shaving cream, from:

> "Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving."

7. On June 6, 1963, petitioner filed with the Commission a motion to correct its third order, stating that the motion was filed with the Commission as a procedural safeguard to preserve its rights to secure judicial review of the order of the Commission. On June 6, 1963, petitioner filed in this Court a motion for leave to file a petition for a writ of mandamus or prohibition or for an order in the nature of mandamus or prohibition; the motion papers state that the motion is filed as a precautionary measure in the event that it were ever determined that the instant petition is inadequate to invoke the jurisdiction of this Court.

III.

Grounds for Relief.

8. The grounds on which relief is sought are:

A. Each of the two paragraphs of the new order fails to accord with the decree of this Court and should be corrected.

(1) The first ordering paragraph improperly defies the holding of this Court that the use of a mock-up in this case did not violate governing law.

[fol. 115] (2) Both ordering paragraphs improperly defy the holding of this Court that Colgate was guilty only of a single representation about a single product and that this fact delimited the proper scope of the order both as to product coverage and advertising content.

B. On remand the Commission sought to reargue views already presented to and rejected by this Court after thorough consideration and deliberation. No new arguments were made in the remand proceedings; and the Commission, in any event, did not petition for rehearing in this Court, or petition the Supreme Court for a writ of certiorari. Even if—contrary to governing law—*de novo* consideration were given to the arguments of the Commission, its views are without support in statute or precedent and were properly rejected by this Court on grounds stated in this Court's opinion and in petitioner's earlier Peti-

tion for Review and to Set Aside dated March 2, 1962. The grounds stated in said earlier Petition at pp. 6-10 (except for those Grounds for Relief set forth therein which solely pertain to the making of a single misrepresentation about a single product) are hereby incorporated by reference as if fully set forth herein.

IV.

Relief Prayed For.

WHEREFORE, petitioner respectfully prays that this Court review the aforesaid proceedings and the order to cease and desist entered thereon, set aside the order of the Commission, correct said order so that it will accord with the decree of this Court that it be confined to a scope [fol. 116] apprppriate to a single misrepresentation about a single product, and award such further or alternative relief as may seem just and proper to the Court.

Dated: June 6, 1963.

Respectfully submitted,

s/ JOHN F. GRODEN
John F. Groden
of WITHINGTON, CROSS, PARK & MCCANN,
Attorneys for Colgate-Palmolive Company,
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Of Counsel:

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MATHIAS F. CORREA,
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80 Pine Street,
New York 5, New York.

[fol. 117] IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Docket No. 7736.

TED BATES & COMPANY, INC., Petitioner,

against

FEDERAL TRADE COMMISSION, Respondent.

PETITION FOR REVIEW AND TO CORRECT AN ORDER OF THE FEDERAL TRADE COMMISSION RENDERED NOT IN ACCORDANCE WITH THE MANDATE OF THE COURT OF APPEALS.—Filed June 6, 1963.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT:

Petitioner Ted Bates & Company, Inc., respectfully petitions this Court, pursuant to the provisions of the Federal Trade Commission Act, Section 5(c), 38 Stat. 791 (1914), as amended, 15 U. S. C. § 45(c) (1958), and Section 5(i), 52 Stat. 114 (1938), as amended, 15 U. S. C. § 45(i) (1958), and Section 10(b) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009(b) (1958), to review and to correct an order to cease and desist rendered by the Federal Trade Commission on May 7, 1963. The Commission's order was entered in *In the Matter of Colgate-Palmolive Company, a corporation, and Ted Bates & Company, Inc., a corporation*, FTC Docket No. 7736, a proceeding on remand from a decision and decree of this Court setting aside the Commission's prior order in the same proceeding. *Colgate-Palmolive Company and Ted Bates & Company, Inc.* v. *Federal Trade Commission*, Nos. 5972 and 5986, 310 F. 2d 89 (1962). As required by Section 5(i) of the Federal Trade Commission Act, [fol. 118] this petition is filed within 30 days after the entry of the order of the Commission refusing to follow the decision and mandate of this Court.

As grounds for this petition, Ted Bates & Company, Inc., represents as follows:

I.

Basis of Venue.

1. The advertising that was held by the Commission to constitute a violation of Section 5 of the Federal Trade Commission Act was broadcast by television from stations in Boston, Massachusetts, and in other cities in this Circuit. Accordingly, the venue of this proceeding lies in this Court pursuant to Section 5(c) of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. § 45(c) (1958), and Section 5(i) of the Act, 52 Stat. 114 (1938), as amended, 15 U. S. C. § 45(i) (1958).

II.

Nature of Procedings.

2. Petitioner Ted Bates & Company, Inc. (hereinafter "Bates") is a corporation organized and existing under the laws of the State of New York with executive offices at 666 Fifth Avenue, New York 19, New York, from which it carries on the general business of an advertising agency.

3. This case is before the Court a second time because of the demonstrable refusal of the Commission to follow the decision and mandate of this Court. The nature of the prior proceedings before the Commission and in this Court which bear upon the corrective judicial action now sought by Bates may be briefly stated:

a. On December 29, 1961, the Federal Trade Commission ruled that Bates and Colgate-Palmolive Company [fol. 119] (hereinafter "Colgate") had violated Section 5 of the Federal Trade Commission Act in advertising for sale, by means of certain television commercials prepared and placed for publication by Bates on Colgate's behalf, Colgate's aerosal shaving cream, "Palmolive Rapid Shave." The Commission held that the challenged commercials constituted false and misleading advertising in violation of Section 5 for two reasons. The Commission

first ruled that the commercials had falsely represented that "Palmolive Rapid Shave" had such moisturizing qualities that "it is possible immediately after application of 'Palmolive Rapid Shave' to shave very coarse, dry sandpaper" with a single stroke of the razor.

Second, and as an independent ground for finding a violation of the Act, the Commission ruled that even if the claim as to the moisturizing qualities of the product had been true, the television commercials violated Section 5 because a mock-up of plastic coated with sand had been used instead of actual sandpaper in portraying a test or experiment showing the shaving of sandpaper on television.

b. The Commission entered an order directing Bates, as well as Colgate, to cease and desist in the advertising, offering for sale, sale or distribution of shaving cream "or any other product" from:

> "Representing, directly or by implication in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations, depictions, or demonstrations of, or do not prove the quality or merits of, any such product."

Bates and Colgate each were further ordered in the advertising, offering for sale, sale or distribution of "Palmolive Rapid Shave" or "any other shaving cream," to cease and desist from:

[fol. 120] "Misrepresenting, in any manner, directly or by implication, the quality or merits of any such product."

(A copy of the Commission's prior order and accompanying opinion is attached hereto as Exhibit A.)

c. Upon petitions for review and to set aside the Commission's order filed by Bates and Colgate (Nos. 5972 and

5986), this Court, after full argument and briefing, reviewed the Commission's opinion and order. In November 20, 1962, the Court rendered a unanimous decision that fully disposed of all the issues raised by Bates and Colgate and presented by the Commission's opinion and order. 310 F. 2d 89. (A copy of this Court's Opinion is attached as Exhibit B.)

The Court first upheld the Commission's ruling that "Palmolive Rapid Shave," the single product involved in these proceedings, did not have the moisturizing quality that had been claimed for it in the challenged television advertising, that this particular claim made for the product was "material," and that the advertising therefore violated Section 5 of the Federal Trade Commission Act. 310 F. 2d at pp. 91-92.

The Court also dealt expressly with the second further independent ground upon which the Commission had found a violation of Section 5—that relating to the use of mock-ups in making truthful advertising claims, which was proscribed in the first portion of the Commission's order quoted above. On this issue the Court reversed the Commission.

The Court held that television advertising which makes a truthful claim for a product does not violate Section 5 merely because a mock-up or prop is used in the advertising instead of the product or instead of some substance represented in the advertising as being used with the product. *Id.* at pp. 93-94.

Apart from disposing of the two substantive grounds for the Commission's decision under Section 5 of the Act, the Court also set forth significant limitations upon any [fol. 121] order that the Commission might enter on remand. Noting that its decision had upheld only the Commission's determination as to a "single misrepresentation about a single product," the Court directed the Commission's attention to the proper scope of an order to be applied to single misrepresentations. *Id.* at 94. Further, as to Bates, the Court stated that it doubted that an order to be entered against an advertising agency should proscribe its conduct in the absence of knowledge on the agency's part as to the falsity of the advertisements. *Id.* at p. 94.

The judgment of the Court was entered in a decree issued the same day the Court rendered its decision. The decree set aside the order of the Commission in its entirety and remanded the case for further proceedings in accordance with the Court's opinion.

4. The Commission did not petition this Court for rehearing. The Commission did not petition the Supreme Court for a writ of certiorari. Nor did the Commission, on remand, authorize Bates and Colgate to file briefs or other papers dealing with the form and scope of the order to be entered in accordance with the decision and mandate of this Court.

Instead, on February 18, 1963, almost three months after this Court's decision, the Commission issued a new "proposed final order" that squarely undertook to proscribe the use of mock-ups in television or any other visual advertising. In this fundamental respect, the proposed order was in direct conflict with and in defiance of the decision and mandate of this Court. The new proposed final order also conflicted with the rulings of the Court in further respects; in particular, the proposed order applied to "any products" for which Bates might in the future prepare advertising or that Colgate might advertise.

The Commission's refusal to follow the decision and mandate of this Court was set forth in an opinion accompanying the "proposed final order." (A copy of the "proposed final order" and the opinion is attached as Exhibit C.)

[fol. 122] 5. Pursuant to the Commission's direction, Bates and Colgate each filed specific, detailed exceptions to the Commission's proposed final order and submitted an alternative form of order which they believed to be in accordance with the mandate and decision of this Court. (A copy of Bates' Exceptions and Proposed Alternative Form of Order is attached as Exhibit D, and a copy of the Statement of Complaint Counsel in Reply is attached as Exhibit E.)

On May 7, 1963, the Commission entered a new "final order." (The Commission did not serve the further "final order" upon Bates and Colgate until May 17, 1963, ten days later.) That order, although differing in certain

respects from the Commission's proposal of February 18, 1963, again reflected the Commission's studied refusal to comply with the decision and mandate of this Court. (This order, accompanied by a further Commission Memorandum Opinion, is attached as Exhibit F.)

Paragraphs III and IV of the final order are applicable to Bates alone. Paragraph III, like the comparable portion of the first "proposed final order," again proscribes the use of mock-ups in advertising even a truthful product claim. It continues to have application to all products for which Bates may hereafter prepare and disseminate advertising for all advertisers whom it now serves or may serve in the future.

Paragraph III thus directs Bates to cease and desist, in the offering for sale, sale or distribution "of any product," from:

> "Unfairly or deceptively advertising any such product by presenting a test, expirement or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein: provided, however, that it shall be a defense hereunder that respondent neither knew nor had [fol. 123] reason to know that the product, article or substance used in the test, experiment or demonstration was a mock-up or prop."

In paragraph IV Bates is further directed to cease and desist, in the offering for sale, sale or distribution of "'Palmolive Rapid Shave' or any other shaving cream," from:

> "Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving: provided, however, that it shall be a defense hereunder that respondent neither knew nor

had reason to know of the falsity of such representation."

An order in the same terms but without provisions making lack of knowledge a defense was entered against Colgate (Paras. I and II).

III.

Grounds for Relief.

6. The grounds on which relief is sought are that the order of the Commission does not accord with the decision and mandate of this Court, as required by Section 5(i) of the Federal Trade Commission Act, in the following respects:

a. Paragraph III of the order improperly and unlawfully prohibits Bates from preparing and disseminating advertising of a product that portrays a test, experiment or demonstration making a truthful product claim if the advertising uses a mock-up instead of the product or instead of any substance used with the product in such test, experiment or demonstration. This portion of the order should be stricken in its entirety; it is clearly at odds with the decision and mandate of the Court in this case.

b. Paragraph III also improperly and unlawfully prohibits Bates from using mock-ups in such advertising of [fol. 124] "any product" of any advertiser whom Bates now serves or may hereafter be called upon to serve as an advertising agency. This sweeping and unlimited product coverage of the order would of course be disposed of if the entire Paragraph III is stricken, as is urged by Bates in the first instance. In any event, in keeping with the statement of the Court that this proceeding involves only a "single misrepresentation about a single product," the product coverage of Paragraph III should be confined to "'Palmolive Rapid Shave' or any other aerosol shaving cream having substantially the same composition made, sold and advertised by Colgate-Palmolive Company."

c. Paragraph IV of the order should likewise be limited, as regards product coverage, to encompass only "'Palmolive Rapid Shave' or any other aerosol shaving cream

having substantially the same composition made, sold and advertised by Colgate-Palmolive Company."

d. Paragraph IV of the order is further improperly broad in that it proscribes representations as to the "moisturizing properties or other qualities or merits" of the products covered by that paragraph. The order should be confined to product claims regarding the "moisturizing properties" of the products covered.

e. Both Paragraphs III and IV improperly require Bates to establish by proof in any future proceedings under the order that it lacked knowledge as to whether mock-ups have been used or as to the falsity of any advertising representations proscribed by the order. These portions of the order should be redrawn to require the Commission itself to prove in any future proceedings that Bates had the requisite knowledge regarding the use of mock-ups and as to the falsity of any representations made.

f. Nothing in the Commission's opinion accompanying its "proposed final order" of February 18, 1963 (Exhibit C), which proposed order was patently contrary to the decision and mandate of this Court, supports its final order of May 7, 1963. The Commission's opinion of Febru-
[fol. 125] ary 18, 1963, sought to reargue the views rejected by this Court as to the use of a mock-up to present a truthful product claim. That basic issue had been fully considered and decided by this Court. The Commission did not petition for rehearing in this Court, or petition for a writ of certiorari in the Supreme Court. Moreover, as made abundantly clear on the earlier review, the Commission's argument—that a mock-up may not be employed in the presentation of a truthful product claim—is without support in the Federal Trade Commission Act, and was properly rejected by this Court. (See Exhibit B, pp. 8-11.)

IV.

Relief Prayed.

The Commission has twice failed—indeed as demonstrated by its opinions on remand, it has patently refused—to enter an order in accordance with the mandate of the Court. Because of the Commission's plain refusal to comply with the mandate, this proceeding has been brought before the Court a second time. It does not appear that the interests of any of the parties, including the Commission, or the efficient administration of the laws would be served by a further remand of this proceeding to the Commission. Further, because the sole question presented for review by the Court is whether the order of the Commission accords with the Court's decision and mandate, the record on review need be no more extensive than the attachments to this petition, Exhibits A-F.

WHEREFORE, petitioner Ted Bates & Company, Inc., respectfully prays that this Court review the order rendered by the Commission on May 7, 1963, to determine whether that order is in accord with the decision and mandate of this Court dated November 20, 1962; that the Court set aside the order of the Commission as not in accord with the Court's decision and mandate; and that the [fol. 126] Court enter an order which does accord with its decision and mandate in the following form:

> "It is Ordered that respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporation or other device, in the advertising of 'Palmolive Rapid Shave' or any other areosol shaving cream having substantially the same composition made, sold and advertised by respondent Colgate-Palmolive Company, in commerce, as "commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> "Misrepresenting, in any respect materal to inducing the sale of any such product, the moisturizing qualities of that product through visual presentation of any experiment or test with the product, either

alone or accompanied by oral or written statements, when respondent knew or reasonably should have know that the product did not have the moisturizing qualities so represented."

Respectfully submitted,

Dated: June 6, 1963.

LANE MCGOVERN
ROPES AND GRAY
Attorneys for Petitioner
Ted Bates & Company, Inc.
50 Federal Street
Boston 10, Mass.

Of Counsel:

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701 Union Trust Building
Washington 5, D. C.

[fol. 127] • • • •

BEFORE

FEDERAL TRADE COMMISSION

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and TED BATES & COMPANY, INC., a corporation

MOTION OF RESPONDENT COLGATE-PALMOLIVE COMPANY TO CORRECT THE ORDER OF THE COMMISSION TO ACCORD WITH THE DECISION AND MANDATE OF THE COURT OF APPEALS.—Filed June 6, 1963.

Respondent Colgate-Palmolive Company moves that the Commission correct its Order rendered herein on May 7, 1963, to accord with the decision and mandate of the United States Court of Appeals for the First Circuit in *Colgate-Palmolive Company and Ted Bates & Company, Inc.* v. *Federal Trade Commission*, Nos. 5972 and 5986, decided November 20, 1962 (310 F. 2d 89), in which decision the Court set aside the prior order of the Commission entered herein and remanded the case for proceedings in accordance with the Court's opinion.

As grounds for this motion, respondent respectfully represents as follows:

1. This motion is filed within 30 days from the date the Commission's Order of May 7, 1963 was rendered, which Order was not served upon respond-
[fol. 128] ent until May 17, 1963. The motion is intended solely as a procedural safeguard to preserve all rights of respondent to secure judicial review of the Commission's Order.

2. The May 7, 1963 Order of the Commission is not in accord with the decision and mandate of the Court in the respects set forth in respondent's "Exceptions to Proposed Order, Statement and Proposed Alternative Form of Order of Respondent Colgate-Palmolive Company" (filed with the Commission on

April 15, 1963) to the extent said "Exceptions" have not been adopted in the Commission's Order of May 7, 1963. The respects in which the Commission's said Order is not in accord with the decision and mandate of the Court are also set forth in respondent's Petition to Correct, Review and Set Aside Order of the Federal Trade Commission filed this day with the Court of Appeals for the First Circuit.

The interests of the Commission and of respondent will be served by an expeditious review by the Court of the Commission's Order of May 7, 1963. To facilitate such review, it is respectfully requested that the Commission take prompt action with respect to this motion.

WHEREFORE, respondent Colgate-Palmolive Company respectfully prays that the Commission correct its Order of May 7, 1963, to accord with the decision and mandate of the Court of Appeals and, to this end, enter the alternative form of order proposed by respondent in its above-[fol. 129] referred to "Exceptions" filed with the Commission on April 15, 1963.

Dated: June 6, 1963

Respectfully submitted,

s/ MATHIAS F. CORREA

MATHIAS F. CORREA
Attorney for Respondent
Colgate-Palmolive Company

Of Counsel:

CAHILL, GORDON, REINDEL & OHL
Arthur Mermin
80 Pine Street
New York 5, New York

* * * *

[fol. 130] BEFORE

FEDERAL TRADE COMMISSION

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and TED BATES & COMPANY, INC., a corporation.

MOTION OF RESPONDENT TED BATES & COMPANY, INC. TO CORRECT THE ORDER OF THE COMMISSION TO ACCORD WITH THE DECISION AND MANDATE OF THE COURT OF APPEALS.—Filed June 6, 1963.

Respondent Ted Bates & Company, Inc., moves that the Commission correct its Order rendered herein on May 7, 1963, to accord with the decision and mandate of the United States Court of Appeals for the First Circuit in *Colgate-Palmolive Company and Ted Bates & Company, Inc.* v. *Federal Trade Commission*, Nos. 5972 and 5986, decided November 20, 1962 (310 F. 2d 89), in which decision the Court set aside the prior order of the Commission entered herein and remanded the case for proceedings in accordance with the Court's opinion.

As grounds for this motion, respondent respectfully represents as follows:

1. This motion is filed within 30 days from the date the Commission's Order of May 7, 1963, was rendered, which Order was not served upon respond-
[fol. 131] ent until May 17, 1963. The motion is intended solely as a procedural safeguard to preserve all rights of respondent to secure judicial review of the Commission's Order.

2. The May 7, 1963, Order of the Commission is not in accord with the decision and mandate of the Court in the respects set forth in respondent's "Exceptions to Proposed Final Order, Statement of Reasons in Support of Exceptions and Proposed Alternative Form of Order in Accordance with the Mandate of the Court of Appeals" filed with the

Commission on April 15, 1963, to the extent said "Exceptions" have not been adopted in the Commission's said Order of May 7, 1963. The respects in which the Commission's said Order is not in accord with the decision and mandate of the Court are also set forth in a Petition for Review and to Correct an Order of the Federal Trade Commission filed this day with the Court of Appeals for the First Circuit.

The interests of the Commission and of respondent will be served by an expeditious review by the Court of the Commission's Order of May 7, 1963. To facilitate such review, it is respectfully requested that the Commission take prompt action with respect to this motion.

WHEREFORE, respondent Ted Bates & Company, Inc., respectfully prays that the Commission correct its Order of May 7, 1963, to accord with the decision and mandate of the Court of Appeals and, to this end, enter the alternative form of order proposed by respondent in its above-[fol. 132] referred to "Exceptions" filed with the Commission on April 15, 1963.

Respectfully submitted,

JOSEPH A. MCMANUS,

JOSEPH A. MCMANUS,
200 Park Avenue,
New York 17, New York.

Dated: June 6, 1963.

H. THOMAS AUSTERN,

H. THOMAS AUSTERN,
ALVIN FRIEDMAN,

ALVIN FRIEDMAN,
701 Union Trust Building.
Washington 5, D. C.

Attorneys for Respondent Ted Bates & Company, Inc.

Of Counsel:

Coudert Brothers,
Covington & Burling.

[fol. 133] * * * *

BEFORE

FEDERAL TRADE COMMISSION

Commissioners:

PAUL RAND DIXON, Chairman
SIGURD ANDERSON
PHILIP ELMAN
EVERETTE MACINTYRE
A. LEON HIGGINBOTHAM, JR.

Docket No. 7736.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY, a corporation, and TED BATES & COMPANY, INC., a corporation.

ORDER DENYING MOTIONS TO CORRECT FINAL ORDER.—June 11, 1963.

Upon consideration of the motions filed on June 6, 1963, by respondents to correct the final order rendered in this proceeding on May 7, 1963, and

It appearing that each motion recites that it "is intended solely as a procedural safeguard to preserve all rights of respondent to secure judicial review of the Commission's Order", and

It further appearing that the motions are based upon the mistaken premise that the Commission's final order is in conflict with the prior decision and mandate of the Court of Appeals for the First Circuit in this proceeding. [fol. 134] *Colgate-Palmolive Company and Ted Bates & Company, Inc.* v. *Federal Trade Commission*, 310 F. 2d 89 (November 20, 1962):

IT IS ORDERED that the motions be, and they hereby are, denied.

By the Commission.

SEAL

(Sgd.) JOSEPH W. SHEA
JOSEPH W. SHEA,
Secretary.

Issued: June 11, 1963

* * * *

[fol. 135] IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 6145 and 6147

COLGATE-PALMOLIVE COMPANY, Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent.

Nos. 6146 and 6148

TED BATES & COMPANY, INC., Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

MOTION TO INCORPORATE IN THE INSTANT MATTERS AS RESPONDENT'S RECORD APPENDIX THE PRINTED JOINT CONSOLIDATED RECORD HERETOFORE FILED IN NOS. 5972 AND 5986—Filed October 16, 1963.

COMES NOW the Federal Trade Commission, respondent, and pursuant to the Court's Rules 16(7) and 16(8) moves the Court to incorporate in the instant matters as respondent's record appendix the printed joint consolidated record filed in Nos. 5972 and 5986. In support of its motion respondent states as follows:

[fol. 136] 1. On November 20, 1962, this Court filed its opinion and decree in *Colgate-Palmolive Company* v. *Federal Trade Commission*, 1st Cir., Nos. 5972 and 5986, setting aside the order of the Federal Trade Commission and directing that "further proceedings are to be in accordance with the opinion filed this day."

2. On February 18, 1963, the Commission issued its opinion on remand and its "Order Providing for the Filing of Exceptions to Proposed Final Order," which order included the proposed final order. In its opinion the Com-

mission stated: "On this remand the Commission has undertaken to reconsider the entire case, and to formulate a new order in light of the various suggestions contained in the opinion of the Court."

3. On May 7, 1963, the Commission issued its final order, which is the subject of the instant review proceedings. The record before the Commission subsequent to the Court's remand consisted of the entire record in Commission Docket No. 7736, which includes not only the record made after remand but also the record made prior to the petitions for review in the Court's Nos. 5972 and 5986.

4. On July 16, 1963, the Commission certified the transcript in the instant appeals by transmitting a "complete transcript of proceedings had before the Federal Trade [fol. 137] Commission in the above entitled matter, after remand from the United States Court of Appeals for the First Circuit." The certificate also stated: "That the record in the Commission's proceeding prior to remand was certified to the United States Court of Appeals for the First Circuit on April 9, [1962]." The transcript certified by the Commission in the instant matters consists of the material certified on July 16, 1963, as well as that certified on April 9, 1962.

5. The material in the certified record that we believe is pertinent to the matters now before the Court, which has not been printed in Petitioners' Consolidated Record Appendix, was printed in the Joint Consolidated Record Appendix heretofore filed in Nos. 5972 and 5986.

WHEREFORE, respondent prays that the Court issue its order incorporating in the instant matters as respondent's record appendix, the Joint Consolidated Record Appendix heretofore filed in Nos. 5972 and 5986.

Respectfully submitted,

/s/ J. B. Truly
J. B. TRULY,
Assistant General Counsel,
Federal Trade Commission,
Attorney for Respondent.

Dated: October 11, 1963.

[fol. 138] * * *

[fol. 139] IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 6145 and 6147

COLGATE-PALMOLIVE COMPANY, Petitioner

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Nos. 6146 and 6148

TED BATES & COMPANY, INC., Petitioner

vs.

FEDERAL TRADE COMMISSION, Respondent

MEMORANDUM OF COLGATE-PALMOLIVE COMPANY IN OPPOSITION TO MOTION BY RESPONDENT, FEDERAL TRADE COMMISSION, TO ENLARGE THE RECORD.—Filed October 16, 1963.

Now comes petitioner, Colgate-Palmolive Company, and submits this Memorandum in opposition to the motion by respondent, Federal Trade Commission, to enlarge the record in the instant proceedings by adding to it the printed record on the prior appeals to this Court—Nos. 5972 and 6986. The motion of the Commission is made pursuant to Rule 16 (7) and (8) of the Rules of this Court. It appears that subsection (8)—which permits enlargement in cases of error or misstatement—must be the basis for the Commission's motion. On July 16, 1963 [fol. 140] the Commission filed with this Court a certified list of material constituting the record in the instant proceedings which did not include the earlier matters which the Commission's motion seeks to add.* Moreover, on July

* This conclusion we believe to be justified from the face of the list so certified.

22, 1963 the Commission was a party to a joint motion to this Court which stated at page 2: "The record on appeal was filed with the Clerk of the Court on July 16, 1963". It is therefore evident that the Commission is now attempting to enlarge the record, and that the issue before the Court is that set forth in Rule 16 (8) mainly, whether anything "material" has been omitted from the existing record.

It is submitted that nothing "material" to the instant proceedings lies outside of the present record.

The earlier appeals are closed. They involved questions both of fact and law fully treated by the Court. Petitioner did not ask to re-argue or to appeal the Court's determinations. Similarly, the Commission did not seek to re-argue, to adduce additional evidence or to appeal. The determinations of this Court have therefore been final and binding on all parties.

The present proceedings are confined to a single question of law: whether the action of the Commission after remand conforms to the decree of this Court. The present record already contains everything which occurred beginning with the decree of the Court and therefore includes everything "material" to the instant proceedings. Perhaps no better proof of this fact exists than the brief submitted [fol. 141] by the Commission. That brief admits that the primary question now before the Court (broken down by the brief in two parts) is whether the Commission has taken action consistent with the direction of the Court (pp. 1-2), and then goes on to pose two additional questions (p. 2) both of which are also questions of law—and are, indeed, addressed to whether the Commission obeyed the Court's decree in two specific areas. None of the questions thus posed by the Commission requires for its resolution citation to the record before the Court in the earlier appeals. This is demonstrated by the brief itself which goes on to discuss the issues posed by it and nowhere finds it necessary to cite the prior record for facts "material" to any of the arguments made by it.*

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* The brief refers in a footnote at p. 25 to the earlier record in a glancing manner clearly immaterial to its argument.

Significantly, the Commission's motion does not contradict the example of its brief: the motion offers no reason why the Commission wishes to enlarge the record.

It therefore appears that the Commission would in no way be prejudiced by denial of a motion which comes after the Commission has submitted its brief to the Court. Surely a motion so belated should meet a standard of good cause for its granting—and this the Commission has not even attempted.

It is submitted that the motion should be denied on the ground that there has been no showing that anything [fol. 142] "material" to the instant proceedings before this Court lies outside the present record.

Respectfully submitted,

WITHINGTON, CROSS, PARK & MCCANN

By John F. Groden
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Of Counsel:

CAHILL, GORDON, REINDEL & OHL
MATHIAS F. CORREA,
80 Pine Street
New York 5, New York

October 15, 1963

CERTIFICATE OF SERVICE

[Omitted in printing]

[fol. 143] * * *

[fol. 144] IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 6145 and 6147

COLGATE-PALMOLIVE COMPANY, Petitioners

v.

FEDERAL TRADE COMMISSION, Respondent

Nos. 6146 and 6148

TED BATES & COMPANY, INC., Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

MEMORANDUM OF TED BATES & COMPANY, INC., IN OPPOSITION TO MOTION BY RESPONDENT FEDERAL TRADE COMMISSION TO ENLARGE THE RECORD BY INCORPORATING THE RECORD IN THE INSTANT APPEALS—Filed October 16, 1963.

Petitioner Ted Bates & Company, Inc., submits this memorandum, pursuant to Rule 25 of the Court's Rules, in opposition to the motion of respondent Federal Trade Commission to enlarge the record in the instant appeals by incorporating the record that was before the Court in the prior appeals, Nos. 5972 and 5986.

[fol. 145] The Commission's motion should be denied. It is an untimely and unjustifiable attempted reversal of the Commission's prior position as to the scope of the record in the instant appeals. Moreover, the Commission has demonstrated no need for the enlargement of the record it belatedly seeks. The Commission's brief in the instant appeals discloses the enlargement of the record it now

requests is entirely unnecessary for proper presentation of its arguments to this Court.

1. The Commission's motion would have it appear that the Commission always envisaged the record in the prior appeals to be a part of the record in the instant appeals. This is contrary to fact.

It is clear beyond dispute that the Commission's position was that the record in the instant appeals did not include the record that was before the Court in the prior appeals. The Commission, it must be recalled, joined with petitioners in stating in the *Joint Motion to Consolidate Appeals, etc.*, filed on July 22, 1963, that: "The record on appeal was filed with the Clerk of the Court on July 16, 1963." The record filed on that date did not include the record in the prior appeals. The attached extract (Exhibit A) from the files of the Clerk of this Court makes clear that the "material certified" to the Court at that time embraced no portion of the record in the prior appeals.

The Commission should not be allowed to reverse its position at this late date—when it has already filed its [fol. 146] brief, and long after petitioners had briefed the instant appeals—and thus secure an enlargement of the record after months have elapsed since by its own action it agreed as to the record in the instant appeals.

2. Not only has the Commission offered no explanation of its delay in seeking the enlargement of the record, but it also has offered no reasons why its motion should be granted.

By contrast, persuasive grounds exist for rejecting the Commission's request. Despite its strenuous effort to enlarge the record, the Commission's brief in the instant appeals is remarkable for its failure to rely upon the record in the prior appeals. Indeed, only once in the course of its argument (in a passing footnote, Br., p. 25 n. 10) does the Commission even refer to that record. Even there, the reference made is only to assist in supporting the obvious proposition that a careful fact analysis is often required to determine whether advertising representations as to the qualities of a product can be substantiated in any particular case by "the actual capacity

of a product." That question is not presented on this appeal; and, in any event, it should certainly require no record citations to establish this essential proposition which is fundamental to any false advertising proceeding. Of course, what an advertisement claims a product can do must be true. But this has nothing to do with the question whether, where the claim for the product is true, the use of a prop or mock-up is unlawful. Nor does it remotely bear on the issue in the instant appeals—[fol. 147] whether the Commission has failed to comply with this Court's decision and mandate.

Were the Commission to demonstrate a reasonable need for enlarging the record in the instant appeals, the Court might then perhaps be called upon to weigh that need and, after doing so, determine whether the motion should be granted. Here, however, no need whatsoever has been offered by the Commission. In light of the Commission's inordinate delay in seeking the enlargement it requests, the proper course in such circumstances is to deny the motion.

Respectfully submitted,

/s/ Lane McGovern
/s/ Ropes & Gray,

LANE MCGOVERN
ROPES & GRAY,
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Of Counsel:

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H. THOMAS AUSTERN
COVINGTON & BURLING
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Washington 5, D. C.

Dated: October 15, 1963

[fol. 148] EXHIBIT A TO MEMORANDUM

Received July 18, 1963, Division of Appeals

MATERIAL CERTIFIED TO COURT 7-15-63 in Docket 7736 IN THE MATTER OF COLGATE-PALMOLIVE COMPANY, et al

Part 1 *Pages*

Part 1

[fol. 149] * * * *

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ORDER OF COURT—October 21, 1963

Upon consideration of motion of respondent to incorporate the joint consolidated record appendix filed in Nos. 5972 and 5986, and of memoranda in opposition thereto,

It is ordered that said motion be, and the same hereby is, denied.

By the Court:

/s/ Roger A. Stinchfield
Clerk

MINUTE ENTRY OF ARGUMENT—November 5, 1963

Thereafter, on November 5, 1963, this cause came on to be heard and was fully heard by the Court, Honorable Peter Woodbury, Chief Judge, and Honorable John P. Hartigan and Honorable Bailey Aldrich, Circuit Judges, sitting.

Thereafter, on December 17, 1963, the following opinion was filed:

[fol. 150]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6145.

COLGATE-PALMOLIVE COMPANY, Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

No. 6146.

TED BATES & COMPANY, INC., Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

ON PETITIONS TO REVIEW
AN ORDER OF THE FEDERAL TRADE COMMISSION

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*

Mathias F. Correa, with whom *Arthur Mermin*, *John F. Groden*, *Cahill, Gordon, Reindel & Ohl* and *Withington, Cross, Park & McCann* were on brief, for Colgate-Palmolive Company.

Joseph A. McManus, with whom *Lane McGovern*, *H. Thomas Austern*, *Alvin Friedman*, *David Falk*, *Coudert Brothers*, *Ropes and Gray* and *Covington & Burling* were on brief, for Ted Bates & Company, Inc.

Philip B. Heyman, Attorney, Department of Justice, with whom *James McI. Henderson*, General Counsel, *J. B. Truly*, Assistant General Counsel, and *Miles J. Brown*, Attorney, Federal Trade Commission, were on brief, for respondent.

[fol. 151] OPINION OF THE COURT
December 17, 1963

ALDRICH, *Circuit Judge.* In 1959 petitioner Colgate-Palmolive Company, at the suggestion of its advertising agency, petitioner Ted Bates & Company, ran a series of television commercials purporting to show, by moving pictures and dialogue, that Colgate's shaving cream Palmolive Rapid Shave was so "moisturizing" that it would permit "tough" (coarse) sandpaper to be "shaved" immediately with a safety razor. The Federal Trade Commission, after a hearing, found that the seeming sandpaper which had been photographed as being shaved in the studio was a plexiglass "mock-up"; that even fine sandpaper could not be shaved immediately; and that coarse paper could not be shaved until "moisturized" for an hour. There being a clear misrepresentation, the Commission entered orders forbidding the continuation of such, or similar, advertising. In addition it forbad, except for purely background purposes, all further undisclosed use of mock-ups.[1] Petitioners, respondents in the proceedings below and hereafter so termed, had made the point that technical problems and imperfections in the photographic process sometimes required the use of mock-ups in order to effect entirely correct reproductions on the screen.[2] The Commission held this to be irrelevant even

[1] For the broad scope of this order, applying to all "pictures, depictions, or demonstrations . . . not in fact genuine . . ." see our former opinion in this case, reported at 310 F.2d 89 (1962), and Judge Wisdom's discussion thereof in *Carter Products, Inc.* v. *F.T.C.*, 5 Cir., 1963, 323 F.2d 523.

[2] It is recognized, for example, that the brown color of iced tea disappears, so that it looks like water. Blue shirts must be worn to simulate natural white. The sand on sandpaper, it was found in this case, fails to reproduce, leaving an apparently plain surface. Some substances which may photograph correctly, such as ice cream or frosting, or the head on beer, melt under the hot lights. In other cases so many retakes may be required that even the actor might fade with repeated consumption of the advertised product. For these and similar reasons, physical properties must sometimes be "made up" or entirely replaced by "mock-ups" although the result is a faithful and accurate portrayal.

[fol. 152] though no quality, attribute, appearance of, or feat which could be performed by, the product was inaccurately represented. On a petition for review, over respondents' opposition which we found conspicuously unmeritorious, we agreed with the Commission that there had been a material misrepresentation of the cream's ability to shave sandpaper, and thus improper advertising. However, we agreed with respondents on the second aspect, and returned the case to the Commission for the formulation of a new order in accordance with our opinion. 310 F.2d at 95. Contending that the new order failed to comply with our expressed views, respondents are back with new petitions.

Prior to the issuance of its new order in final form the Commission handed down a fifteen-page opinion,[3] hereinafter the "second opinion," in which it recited that our "various suggestions" "in substantial part have been accepted." We reached a number of conclusions not labelled suggestions which the Commission was not free to disregard under the mandate. 15 U.S.C.A. § 45(i); see *Virginia Lincoln Furniture Corp.* v. *Commissioner*, 4 Cir., 1933, 67 F.2d 8 (comparable provision under the revenue acts); *cf. Morand Bros. Beverage Co.* v. *NLRB*, 7 Cir., 1953, 204 F.2d 529, 532, *cert. den.* 346 U.S. 909. Respondents assert that it has done so in substantial measure.[4]

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[3] We mention the length of this opinion lest it be thought that the ambiguities we are about to discuss were due to cursory or ill-considered expression by the Commission. In fact the Commission wrote still a third opinion when it puts its present order in final form, and after respondents had asserted difficulties in interpretation. In this third opinion it said that it had now acted to "restate with clarity and precision the basis and breadth of our findings and order."

[4] See also, *e.g.*, Note, The Rapid Shave Case, 38 Notre Dame Law. 350, 354 (1963). "The Commission has not capitulated, but has merely withdrawn to regroup its forces." The Commission's response is that if it has departed from our opinion it is because we misunderstood its original intention, due in large measure to "extreme arguments" made by its counsel. Because of this we asked present counsel whether he had cleared his argument with the Commission, and received an affirmative reply. The importance of this will shortly become apparent.

[fol. 153] But because much importance beyond this particular case has become attached to the Commission's antipathy to mock-ups, we will make an exception and reexamine its present[5] position on the merits rather than from the limited standpoint of whether it comports with our previous opinion.

The substance of the present order is contained in the following passage. Respondents are to cease and desist from,

> "Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein."

If, to ascertain what is meant by "demonstration" and "actual proof" of a material claim, one turns to the second opinion, one learns that a "demonstration" is something which "prove[s] visually a quality claimed" for a product as distinguished from a "casual or incidental display" which is "not presented as proof of the . . . [quality] or appearance of the . . . [product], and thus in no practical [fol. 154] sense would have a material effect in inducing sales . . . ."[6] In the view of the Commission this language "resolved" any "ambiguity." In the balance of its opinion, directed to the scope of the order, the Commission discussed examples of admittedly material misrepresentation, such as improper disparagement of a competitor, dis-

[5] There is so much in the Commission's second and third opinion about our having misunderstood its original position that we are not sure whether we now have before us a new position, or merely its old one "restated." See fn. 3, *supra*.

[6] The Commission rephrases this in its brief as the difference between a mock-up which "displays or illustrates a claim," and one that purportedly "objectively" "proves its truthfulness." As will be developed, we find this less than a clarification of what the Commission states (fn. 3, *supra*) was already "precise."

honest testimonials, misrepresentation of the seller's trade status, or of its receipt of an award or of prominent patronage, and concluded with the following footnote,

> ". . . The misrepresentation would not have been greater or more material, but only more explicit, if the announcer had stated: 'this test is being made on real sandpaper, and not an artificial mock-up contrived to look like sandpaper.' The point is, whatever the technical photographic reasons justifying use of a mock-up, there could be no justification for the false presentation to the public of 'proof' that in fact was not proof."

At the oral argument, to test whether there was no ambiguity, we asked counsel for the Commission if an ice cream manufacturer showed an enlarged and appealing photograph of what was apparently rich, creamy ice cream which coincided exactly in appearance with its product, but was in fact a mock-up (see fn. 2, *supra*), it was not an attempt "to prove visually the quality . . . or appearance of the product" that might have a "material effect in inducing sales," and hence deceptive advertising. He replied this would be unobjectionable because "demonstration" in the Commission's order was to be read by the [fol. 155] rule of *ejusdem generis*, and meant demonstration "in the nature of a test or experiment."[7] He added that a buyer would be "morally disillusioned" if he learned that he had witnessed a phony test, but that a buyer of the ice cream would be indifferent to the use of the mock-up.[8] The important difference, the Commission asserts, is that in the case of a test, as distinguished from a display or illustration, the viewer believes he has seen "proof" which transcends the advertiser's "word."[9]

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[7] See fn. 4, *supra*. The ice cream matter was dealt with less specifically in the second opinion, the Commission saying that such an illustration was proper if "incidental."

[8] In other words, to have seen simulated sandpaper wetted by shaving cream is less palatable than to have one's appetite whetted by emulsified cold cream.

[9] The Commission also claims that its toleration of such deception would be unfair to competitors. This would seem in this

While, as we said in our previous opinion, every undisclosed use of mock-up or make-up involves a "misrepresentation of a sort," we must consider the consequences of the Commission's order. In spite of the Commission's belief that it has resolved all ambiguities, we envisage great difficulty in determining any dividing line between what is and what is not a test or experiment, or in defining what is a demonstration in the nature of such. Primarily this may be because we find no substantial logical difference between what the Commission disapproves of and what it accepts. We do not see, for instance, why any pictorial representation of delicious-seeming ice cream is not intended to "prove visually the quality . . . or appearance" of the product. Or, to turn to the Commission's footnote, that the exhibitor does not impliedly say, "This is our ice cream," just as much as the implied announcement, "This is real sandpaper," is attributed to Colgate. [fol. 156] The issue of implication goes deeper. If a manufacturer exhibits a bed sheet, in fact blue, but apparently white, in connection with advertising its soap, is this depiction something which merely "displays or illustrates a claim," and therefore benign,[10] or does it (improperly) imply there has been a test? Even if it does imply a test, is this permissible since because this was not "verified or proved by an experiment performed before the eyes of the viewer" (Commission's brief) he cannot believe he has seen "proof" independent of the advertiser's "word?"[11] If the mere exhibition of the doctored sheet is not forbidden (provided the total effect is correct), would it become a "demonstration in the nature of a test" if the

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context a mere restatement of the Commission's position rather than additional argument.

[10] See fn. 6, *supra*.

[11] In its first opinion the Commission said, "[A]n announcer may wear a blue shirt that photographs white; but he may not advertise a soap or detergent's 'whitening' qualities by pointing to the 'whiteness' of his blue shirt. The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not." We would hazard no guess as to the extent, if any, the Commission has now departed from this position.

sheet were shown being taken out of a washing machine? Again, if an adult may be pictured apparently enjoying allegedly delicious medicine (the Commission accepts fully the "I love Lipsom's" hypothetical in our earlier opinion, 310 F.2d at 93, n.7) does it become a test or a demonstration in the nature of a test if the supposed patient is so young that it may be thought that the smile of enjoyment was a spontaneous reaction? And if so, how young? Such questions, and others like them, may be readily put, not as the product of a fertile imagination, but as the result of ephemeral examination of current TV commercials.

The existence of such difficulties can only bring to mind the principle that an order must be capable of practical interpretation. *F.T.C.* v. *Henry Broch & Co.*, 1962, 368 [fol. 157] U.S. 360, 368.[12] The relative insignificance of the issue before us makes it particularly unwarranted to offend this principle. By hypothesis we are not talking about misrepresentation of any quality or appearance of the product, or whether it can or cannot perform the "test" which it is claimed to accomplish. We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or make-up. As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree.[13]

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[12] While there is much meat in Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev. 865 (1963), we suspect that respondents would find little nourishment in the author's thesis that the courts may be counted on to neutralize, at the stage of adjudicating violation or imposing penalty, excesses by administrative bodies. Nor does the Commission's suggestion of advisory administrative opinions seem a ready solution. We think the very suggestion indicates the Commission's failure to realize the scope of the problem.

[13] In *O'Day Corp.* v. *Talman Corp.*, 1962, 310 F.2d 623, 626, n. 5, *cert. den.* 372 U.S. 977, we held that it was not unfair competition, where defendant sold, and could properly sell, a sailboat substantially identical to plaintiff's for defendant to use in its advertisements a picture which in fact was of plaintiff's boat instead of its own. While in that instance the boat was not "performing," we do not think the result would have been different if she had been photographed under sail if their performance was the same.

In seeking to stress the extent of misrepresentation by mock-up the Commission sometimes loses sight of the difference between a mock-up which presents an accurate portrayal and one, like Colgate's, that effects a basic deception, and at other times, in speaking of the buyer's "disillusionment," proceeds as if he would learn of the mock-up, but would not learn that no quality or characteristic of the product had been misrepresented.[14] Nor are [fol. 158] we impressed the strength of the previously mentioned difference that in a "genuine" test the viewer has more "proof" than the advertiser's "word." Even here there is usually a significant dependence upon the advertiser's word. We may take judicial notice that commercials are normally prerecorded. We may also assume, although the matter is not adverted to by the Commission, that the exhibition of a test implies that it can always be carried out, and not that this was the rare exception. The Commission has never opposed prerecordings, nor do we think it should, yet on this vital implication there is only the advertiser's word. We see little difference between this and taking his word that the test depicted is a faithful reproduction in other respects.

The Commission's real objection, of course, is not to the resort to a mock-up, but to the implied representation that none is employed. This is apparent not only from the cases it regards apposite, which involved positive affirmations, such as that the manufacturer had (contrary to fact) received an award, or testimonials, or orders from certain customers, but also specifically from its conclusion that respondents' advertisement would be no worse, "only more explicit," if the announcer had affirmatively stated, "This is real sandpaper." The nub of this case, to return to our ice cream comparison, is either that Colgate impliedly says its depiction is real and the ice cream manufacturer does not, or that the

[14] We pointed out in our previous opinion there was a difference between claiming that one had received a certain testimonial when one had not, and merely reproducing (without disclosure) a copy of an actual testimonial because the original would not "photograph." The second opinion continues to talk only about the former.

misrepresentation is material in the case of the sandpaper, and harmless in the case of the ice cream. The Commission says the ice cream case is different, but, with all deference, we find its opinion, while long on generalities, short on analysis. It would seem paradoxical to say that a misrepresentation that what is shown is the [fol. 159] actual product is harmless while a misrepresentation as to something else is not. Yet we cannot see why if the representation is to be implied in one instance it is not in the other.

Under all the circumstances, we see only one practical solution. It is to hold that, in the absence of any express statement,[15] the only implied representation is that no basic dishonesty has been introduced into the picture by the photographic process. Such a principal would, we think, be of universal application, and would include all demonstrations whether in the nature of a test or otherwise. It would cover the situations we found troublesome in our previous opinion which the Commission has failed to discuss,[16] and every case of mock-up or make-up purporting to reproduce on the screen an exact representation of the qualities and appearance of the product, or, in the case of a claim of performance, of an actual test. If there is an accurate portrayal of the product's attributes or performance, there is no deceit. Such a principal may not be meticulously perfect, but we believe it would lead to minimum uncertainty and go more nearly to the heart of the matter.[17] It would also avoid the inroads into

[15] Contrary to the Commission, we believe it may, within limits, be more serious for the advertiser to misstate affirmatively the details of what is being shown than to imply them. The very fact of affirmation, as well as indicating an actual intent, dignifies the representation. *Cf. NLRB* v. *Trancoa Chemical Corp.*, 1 Cir., 1962, 303 F.2d 456, 461. We would doubt, for instance, that if a manufacturer stated, "This is an actual unretouched photograph of our ice cream," the Commission would regard it as immaterial that the subject was a mock-up.

[16] *E.g.*, a "genuine" demonstration in which the normal photographic process actually upgrades the product. See, also, fn. 14, *supra*.

[17] The Commission makes the point that such permissive use of mock-ups would greatly increase its policing difficulties. The Commission clearly has such duties, and considering the substantial man-

[fol. 160] the commercial's sixty seconds which would result from having to make the statement whenever mock-ups were used that the exhibition, though employing artificial aides, was a faithful portrayal of actual events, together with such other rehabilitating data as might be thought necessary to make the showing persuasive. While we do not make the basis of our decision, we reiterate our former observation that an enforced remedy should not outdistance the need.

The principale we espouse has no special relationship to mock-ups, and to amend the present order along such lines would serve no particular purpose. Accordingly, we instruct the Commission as we though we had directed it before, to enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished. However, as to what terms the new order should contain with respect to products and customers, we did not, as the respondents seem to feel, direct the Commission to enter the narrowest possible order. There is more than one way to deal with a "single offense," *cf. All-Luminum Products, Inc.*, FTC 11/7/63, particularly a blatant one. We do agree with respondents that the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct. In this situation we continue to believe that we should not comment on the precise terms of an order *in vacuo*. We will add, however, in view of the [fol. 161] strenuous opposition expressed by respondent Ted Bates & Company to the so-called "imposition of a

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ner in which repondents' mock-up departed from the truth and their insistence even in this court that there had been no misrepresentation, (see, also *Carter Products Inc.* v. *F.T.C., supra*) we are sympathetic. There are, however, other solutions. For instance, there might be no objection to a properly formulated rule placing the burden of going forward (we do not mean burden of proof, *cf. United Aniline Co.* v. *Commissioner*, 1 Cir., 1963, 316 F.2d 701) upon a party who uses a mock-up or make-up to show that no basic deception, as we have been using the term, was accomplished thereby. This burden might be particularly heavy if there was no "photographic" reason for employing a substitute.

burden" of showing extenuation,[18] that respondent has misconceived the principle. The Commission has allowed it an escape, rather than imposed a burden. We see no reason why advertising agencies, which are now big business, should be able to shirk from at least prima facie responsibility for conduct in which they participate.

Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DECREE—December 17, 1963.

This cause came on to be heard on petitions for review of an order of the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Federal [fol. 162] Trade Commission is set aside and the cause is remanded for further proceedings in accordance with the opinion filed this day.

By the Court:

/s/ ROGER A. STINCHFIELD, Clerk.

Approved:

/s/ PETER WOODBURY, Ch.J.

[fol. 163] [Clerk's Certificate to foregoing transcript omitted in printing.]

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[18] The same order was entered against Bates as against Colgate, but with respect to Bates there was a proviso that lack of knowledge, or of reason to know, of the existence of a mock-up would be a defense.

[fol. 164] SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1963

FEDERAL TRADE COMMISSION, Petitioner

vs.

COLGATE-PALMOLIVE CO., ET AL

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—March 19, 1964

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1964.

/s/ Arthur J. Goldberg
ARTHUR J. GOLDBERG
Associate Justice of the Supreme Court of the United States.

Dated this 19th day of March, 1964.

[fol. 165] SUPREME COURT OF THE UNITED STATES

No. 1010, October Term, 1963

FEDERAL TRADE COMMISSION, Petitioner

vs.

COLGATE-PALMOLIVE COMPANY, ET AL.

ORDER ALLOWING CERTIORARI.—May 25, 1964.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.